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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1996

WASHINGTON RESTAURANT MANAGEMENT, INC.,
Petitioner,

VS.

THE VONS COMPANIES, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether or not California's assertion of personal jurisdiction over a Washington resident who's alleged tortious conduct occurred solely in Washington and who's only contacts with California arose out of Franchise Agreements to which the plaintiff was not a party, was violative of the Due Process Clause of the United States Constitution.

More specifically stated, the issue is whether a claim by a California meat supplier alleging damage as a result of negligent cooking of hamburgers by a Washington fast-food restaurant "arises out of or is related to" defendant's contacts in California, which contacts were limited solely to a contractual relationship with a California franchisor.

PARTIES TO THE PROCEEDING

Pursuant to Rules of the Supreme Court, rules 14(1)(b) and 26.6, the parties to the proceeding in the California Supreme Court were as follows:

Petitioner: The Vons Companies, Inc.
Respondents: Seabest Foods, Inc.
Washington Restaurant Management, Inc.

At the time of the commencement of this action, petitioner Washington Restaurant Management, Inc. ("WRMI") was a closely-held corporation with no parent companies and no subsidiaries of any kind. During the pendency of this proceeding, WRMI was dissolved.

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PETITION FOR WRIT OF CERTIORARI

JURISDICTIONAL GROUNDS FOR PETITION

Orders sought to be reviewed

This Petition for Writ of Certiorari seeks review of a decision of the California Supreme Court dated December 12, 1996.[1] The Supreme Court subsequently denied a Petition for Rehearing on February 5, 1997.[2]

This Petition is proper and timely pursuant to Rules of the Supreme Court of the United States, Rule 13.3 and 28 U.S.C. 2101(c).

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[1] *Vons Companies, Inc. v. Seabest Foods, Inc., et al.* (1996) 14 Cal.4th 434. The decision is reproduced in Appendix "A" hereto. Specific page references to this Opinion will be designated as "App.1a," "App.2a," and so on.

[2] The order denying the Petition for Rehearing is reproduced in Appendix "B" hereto.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Petition seeks interpretation of the following constitutional provision:

The Fourteenth Amendment to the United States Constitution.

> No state shall . . . deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

This case arises out of an outbreak of illnesses attributed to hamburgers **solo** at Jack-in-the-Box restaurant franchises in several western states in 1993 which were allegedly contaminated with E. coli bacteria. Many people became ill as a result of the bacteria and several died. At all times relevant, petitioner Washington Restaurant Management, Inc., (hereinafter "WRMI") was a Washington corporation doing business as a Jack-in-the Box franchise located in the state of Washington. Petitioner's franchise was identified as one of the franchises which had sold tainted hamburger patties.

The instant litigation commenced when various Jack-in-the Box franchises sued three groups of defendants in the California Superior Court alleging lost profits as a result of the negative publicity surrounding the outbreak. The defendants were (1) Foodmaker, Inc., the franchisor ("Foodmaker"); (2) The Vons Companies, Inc. ("Vons"), the processor of the meat; and (3) certain beef suppliers which delivered the raw materials allegedly used by Vons in processing the tainted hamburger patties. Various cross-complaints were filed, among them Vons' cross complaint against the owners of several Jack-in-the-Box franchisees, including WRMI, which were identified as sellers of con-

taminated hamburger patties.[3] Vons alleged that the franchisees negligently or recklessly undercooked hamburger patties that were allegedly processed by Vons and that this negligence caused Vons to suffer significant losses from adverse publicity and to face numerous claims from various defendants.

WRMI filed a motion to quash service of Vons' cross-complaint on the ground that California lacked personal jurisdiction to hear the claim, or in the alternative, to dismiss the action on grounds of inconvenient forum.

The trial court granted WRMI's motion to dismiss for lack of jurisdiction, finding that WRMI did not have sufficient contacts with California to permit the exercise of personal jurisdiction. On appeal, the Second Appellate district affirmed in a published decision entitled *Vons Companies, Inc. v. Seabest Foods, Inc.* (1995) 37 Cal.App.4th 1090. However, the California Supreme Court granted review, and on December 12, 1996, it reversed, holding that California did have personal jurisdiction over WRMI. *(Vons Companies, Inc. v. Seabest Foods, Inc., supra.* 14 Cal.4th 434.) A Petition for Rehearing filed by co-respondent Seabest Foods, Inc. was denied by the California Supreme Court on February 5, 1997.

WRMI continues to assert that Vons has failed to establish that California may constitutionally exercise specific jurisdiction over WRMI for purposes of this litigation.[4] The undisputed facts pertinent to the issue of specific jurisdiction, briefly stated, are as follows:

WRMI is a Washington corporation. At all times relevant to this lawsuit, WRMI's exclusive business was the opera-

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[3]WRMI was not among the franchises which filed suit against Vons.

[4]All parties agree that this case presents a question of specific jurisdiction and that the concept of general jurisdiction is not applicable.

tion of several Jack-in-the-Box restaurants in the State of Washington. It is undisputed that WRMI does not do business in California, owns no real or personal property in California and has no agent or employee in California. WRMI has never contracted or done business with Vons. WRMI does not advertise or otherwise promote its business in the State of California. WRMI purchased the hamburger meat which is the subject of Vons' cross-complaint from distributors and suppliers in the State of Washington. The meat was cooked, sold and served in the State of Washington and the illnesses attributed to that meat occurred in the State of Washington.

The basis for the California Supreme Court's finding that WRMI is subject to personal jurisdiction in California is the fact that WRMI entered into Franchise Agreements with Foodmaker, a Delaware corporation with its principle place of business in California, and had some contacts with the State of California in connection with those Agreements. The Court concluded that these contacts were substantially related to Vons' claim. The contacts consisted primarily of two meetings in California between Foodmaker and the President of WRMI prior to entering into the Franchise Agreements, one meeting in California after the purchase of the franchise, several management training sessions in California, monthly electronic payments by WRMI to Foodmaker's California bank, and occasional miscellaneous communications between WRMI and Foodmaker. The Franchise Agreements between WRMI and Foodmaker provided that any action for breach of the Franchise Agreement would be litigated in California pursuant to California law.

It is undisputed that WRMI does not have and never did have any contractual relationship with Vons and that Vons was not a party to the Franchise Agreements between WRMI and Foodmaker.

ARGUMENT

I.

REVIEW IS PROPER AND NECESSARY BECAUSE THIS PETITION RAISES AN IMPORTANT CONSTITUTIONAL ISSUE FOR WHICH THERE EXISTS A SPLIT OF AUTHORITY AMONG THE FEDERAL AND STATE APPELLATE COURTS WHICH CAN ONLY BE SETTLED BY THIS COURT

A. Introduction

Review on writ of certiorari is a matter of judicial discretion and a petition will be granted only upon a showing of special and important reasons therefor. Reasons favoring a grant of review include situations in which a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals. Review is also appropriate where a state court has decided an important question of federal law which has not been, but which should be, settled by this Court. (Rules of the Supreme Court, Rule 10)

This is just such a case.

As will be shown, the issue presented here, specifically the scope of the "arising out of or related to" prong of minimum contacts, due process analysis has not been specifically addressed by this Court. It has, however, been considered by most of the federal appeals courts. Unfortunately, as was recognized by the California Supreme Court below, due to the lack of guidance on the issue, the result has been a split of authority over how to define and apply the so-called "relatedness" standard. Moreover, the instant case widens rather than narrows the split, because in holding that California has specific jurisdiction over WRMI in this action, the California Supreme Court expressly rejects at least three

of the various tests which have been adopted and applied by various federal circuits in favor of its own unique version of the "relatedness" standard (App. 52a-53a)

Thus, as will be shown, it is apparent that a serious split of authority between and among various appellate courts, all seeking, unsuccessfully, to articulate the appropriate standard for which jurisdiction can be exercised over out-of-forum defendants pursuant to federal constitutional principles, continues to exist and continues to result in sharply different conclusions depending upon the standard applied in the particular jurisdiction.

Accordingly, review by this Court is not only appropriate, but necessary to achieve an acceptable degree of uniformity between the states and the federal circuits in analyzing this most basic of due process rights.

B. The appellate courts have been unable to agree on a uniform and consistent relatedness standard in minimum contacts analysis

California's long-arm jurisdiction statute as set forth in Code of Civil Procedure section 410.10 provides that "[a] court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States. The California Constitution, Article I, section 7 provides that '[a] person may not be deprived of life, liberty, or property without due process of law . . .' " Thus, the due process analysis pursuant to California law is identical to federal due process analysis.

It has long been established that the due process clauses of the United States Constitution protect an individual's liberty interest in not being subject to the binding judgments of a forum within which he has established no meaningful "contacts, ties, or relations." *International Shoe Co. v. Washington* 326 U.S. 310, 66 S.Ct. 154, 90 L. Ed. 95 (1945).

This Court has acknowledged the distinction between "general jurisdiction" in which a forum state asserts personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum, and "specific jurisdiction" in which a state exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contact with the forum. *Helicopteros Nacionales de Columbia v. Hall* 466 U.S. 408, 414 nn. 8-9, 104 S.Ct. 1868, 1872, 80 L.Ed.2d 404 (1984). All parties to this proceeding concede that this action presents a question of specific, not general jurisdiction.

In a series of modern cases discussing personal jurisdiction, this Court has further acknowledged that there is a two-pronged analysis which must be conducted in order to establish that a forum state has specific personal jurisdiction over an out-of-state defendant. The first prong determines whether the defendant has sufficient minimum contacts with the forum state so as to permit an assertion of jurisdiction. If minimum contacts are established, the court must then determine whether assertion of jurisdiction would be "reasonable". *Asahi Metal Indus. Co. v. Superior Court* 480 U.S. 102, 108-116, 107 S.Ct. 1026, 1030-1034, 94 L.Ed.2d 92 (1987); *Burger King Corp. v. Rudzewicz* 471 U.S. 462, 476, 105 S.Ct. 2174, 2184, 85 L.Ed.2d 528 (1985).

This Court has stated that specific jurisdiction may be asserted against an out-of-state defendant

> . . . if the defendant has 'purposefully directed' his activities at residents of the forum, *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984), and the litigation results from alleged injuries that 'arise out of or relate to' those activities." *Helicopteros, supra*, 466 U.S. at 414 (1984). *Burger King, supra*, 471 U.S. at 472.

Thus, the general parameters that surround due process minimum contacts analysis are familiar and well-estab-

lished. The problem lay, however, in application of these parameters, and particularly in application of the 'arising from or related to' standard. To date, apart from generally acknowledging this standard as an important factor in determining the appropriateness of assertion of personal jurisdiction over an out-of-state defendant, this Court has yet to offer any clarification as to the scope or application of this factor. Indeed, this Court has twice declined to comment on the issue.[5]

Because of the lack of guidance from this Court as to this important issue, the lower courts have been left to their own devices to interpret the relatedness standard and the scope of its application. The result has been general confusion

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[5] In *Helicopteros, supra*, 466 U.S. 408, the parties apparently conceded that plaintiff's claims did not "arise out of" or "relate to" defendant's activities within the forum. However, some commentators have suggested that the facts of that case would have supported a specific jurisdiction analysis. (See, for example, Maloney, *Specific Personal Jurisdiction and the "Arise From or Relate To" Requirement. What Does It Mean?*, 50 Wash. & Lee L. Rev. 1265 at 1273 (1993), stating that *Helicopteros* "could have been the perfect test case" and citing (1993) *Richman, Part I-Casad's Jurisdiction in Civil Actions, Part II-A Sliding Scale to Supplement the Distinction Between General and Specific Jurisdiction,* 72 Cal.L.Rev. 1328, 1338 (1984) and Terez, *The Misguided Helicopteros Case; Confusion in the Courts Over Contacts* 37 Baylor L. Rev. 913, 934-35, n. 110 (1985), for the same proposition). Nevertheless, this Court accepted the parties "concession" and limited its inquiry to general jurisdiction issues.

In *Carnival Cruise Lines, Inc. v. Shute* 499 U.S. 585, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991), although the appellate court had decided that personal jurisdiction existed over the defendant, this Court did not reach the constitutional issue, deciding the case instead on the basis of a contractual choice of forum clause which the appellate court had held invalid. In so doing, this Court stated, "it is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case." (*Carnival Cruise Lines, supra*, 499 U.S. at 589, citing *Bruton v. United States* 196 U.S. 283, 295, 25 S.Ct. 243, 49 L.Ed. 482 (1905).)

characterized by expressions of frustration by the lower courts and commentators alike, as well as the adoption of numerous "tests" to define relatedness, none of which has found general acceptance. One commentator has succinctly noted,

> [a]s a result of the lack of guidance from the Supreme Court, courts have attempted to develop their own definition of "arise from or relate to." Predictably, courts have chosen different paths. [fn. omitted] Maloney, *supra*, 50 Wash. & Lee L. Rev. at 1276.

For example, one of the tests which has emerged is the broad "but for" test of relatedness. This test has been expressly adopted and endorsed by the Ninth Circuit, most notably in *Shute v. Carnival Cruise Lines* 897 F.2d 377, 385 (9th c., 1990), rev'd. on other grounds in 499 U.S. 585, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991) in which the court held that "but for" defendant's advertisement in the forum, plaintiff would have never taken the advertised cruise and never would have suffered a slip and fall injury on the ship. In *Shute*, the Ninth Circuit stated that a "but for" analysis serves the basic function of relatedness by "preserving the essential distinction between general and specific jurisdiction" and warned that a more stringent standard "would represent an unwarranted departure from the core concepts of "fair play and substantial justice." *Id.* p. 385.

Nonetheless, commentators have criticized the "but for" test, pointing out that the test runs into difficulties in certain circumstances, for example, where the injury is either cumulative or the result of multiple causes, where the forum contact is a "social phenomena" such as advertising, or where the contact is particularly remote but still an historical cause of the injury. (Rose, *Related Contacts and Personal Jurisdiction: The "But For" Test* 82 Calif.L.Rev. 1545, 1570-73 (1994).

It appears that no other circuit apart from the Ninth Circuit has expressly adopted the "but for" test. However, other circuits have used a similar approach. For example, in *Deluxe Ice Cream Co. v. R.C.H. Tool Corp.* 726 F.2d 1209 (7th c., 1984) the Seventh Circuit upheld jurisdiction for claims which "lie in the wake of" the defendant's commercial activities in the forum. (See also *In re Oil Spill by Amoco Cadiz* 699 F.2d 909, 915-16 (7th c., 1984).)

The Fifth Circuit's position is somewhat unclear. It has stated that a contractual contact in the forum may be a "but for" causative factor for a tort since it may bring the parties "within tortious striking distance" of each other. *Prejean v. Sonatrach, Inc.* 652 F.2d 1260, 1270 (5th c., 1981). However, in a more recent case, the same circuit found no jurisdiction over a cause of action arising out of plaintiffs employment where the employment contract was entered into in the forum. *Aviles v. Kunkle* 978 F.2d 201 (5th c., 1992).

The Sixth Circuit employed a "substantial connection" standard in *Third National Bank v. WEDGE Group, Inc.* 882 F.2d 1087, 1091 (6th c., 1989), *cert. denied* 493 U.S. 1058, 107 L.Ed.2d 953, 110 S.Ct. 870. However, in *Lanier v. American Bd. of Endodonics* 843 F.2d 901, 909 (6th c.), *cert. denied* 488 U.S. 926, 109 S.Ct. 309, 102 L.Ed.2d 328 (1988), the Sixth Circuit employed a "made possible by" test, arguably analogous to the "but for" standard.

On the other end of the relatedness spectrum lie the First, Second and Eighth Circuits, all of which appear to endorse a more narrow, "proximate cause" standard. This standard, or something like it, is sometimes called the "substantive relevance" test.[6] See, for example, *Pearrow v. National Life*

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[6]This designation is apparently derived from a widely quoted article by Professor Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 Sup.Ct.Rev. 77, in which

& Accident Ins. Co. 703 F.2d 1067, 1069 (8th c., 1983) and *Gelfand v. Tanner Motor Tours, Ltd.* 339 F.2d 317, 321-22 (2nd c., 1964) which both found that non-forum negligence claims did not arise from in-forum solicitation or ticket sales. In *Pizarro v. Hoteles Concorde Int'l.* 907 F.2d 1256, (1st c., 1990), the First Circuit found noteworthy the fact that defendant's in-forum advertisements were not the proximate cause of the plaintiffs' injury.

In the recent case of *Nowak v. Tak How Investments, Ltd.* 94 F.3d 708, (1st c., 1996), the First Circuit reaffirmed its support of the proximate cause analysis, pointing out that this Court has emphasized the importance of "fair warning" or foreseeability, and holding that:

> . . . the proximate cause standard better comports with the relatedness inquiry because it so easily correlates to foreseeability, a significant component of the jurisdictional inquiry." (*Id.*, p. 715)

The *Nowak* court specifically criticized the "but for" analysis in this regard, noting that it has "no limiting principle; it literally embraces every event that hindsight can logically identify in the causative chain." (*Ibid.*) Nevertheless, the *Nowak* court did endorse a slight "relaxation" of the proximate cause standard, noting that in some circumstances, strict adherence to this standard may be unnecessarily restrictive. The Court emphasized that "this concept represents a small overlay of 'but for' on 'proximate cause.' (*Id.*, p. 715).

It seems then, that most of the federal circuit courts have split into two general camps, each endorsing some variation of the "but for" rule or the "proximate cause" or "substantive relevance" rule. Interestingly, in the case at Bar the

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Professor Brilmayer proposed a relatedness test in which a forum contact be considered "related" if the fact of that contact is important in establishing plaintiff's substantive claim. (*Id.*, pp. 88-96)

California Supreme Court expressly rejected each of these approaches in favor of a still different "substantial connection or nexus" test.

Specifically, the *Vons* court stated:

> . . . the crucial inquiry concerns the character of defendant's activity in the forum, whether the cause of action arises out of or has a substantial connection with that activity, and upon the balancing of the convenience of the parties and the interests of the state in assuming jurisdiction. (*Vons*, *supra*, App. 19a, quoting *Cornelison v. Chaney* (1976) 16 Cal.3d 143 at 148)

Having correctly defined the general parameters of specific jurisdiction analysis, however, the court then went on to specifically note that this Court has "declined to clarify the relatedness element of specific jurisdiction" (*Vons*, *supra* App. 17a, fn. 4) and further noting that "[t]he high court has not provided precise criteria regarding the particular issue before us — that is, the necessary relationship between the plaintiff's cause of action and the defendant's contacts in the forum." (*Vons*, *supra*, App. 20a)

The *Vons* court also recognized that while superficially similar to *Burger King*, *supra*, 471 U.S. 462 (1985), this case is inherently distinguishable from *Burger King* as to the key relatedness element. (*Vons*, *supra*, App. 17a-18a). In *Burger King*, the claim asserted against the franchisee was for breach of a Franchise Agreement which contained a choice of law provision in favor of the forum state in the event of a breach. Here, in contrast, the claim does not arise out of any alleged breach of the Franchise Agreement and moreover, the claimant Vons was not even a party to the Franchise Agreement. Therefore, here, unlike in *Burger King*, there exists a serious question as to whether or not the claim "arises out of or relates to" the Franchise Agreement,

which Agreement forms the only connection between Petitioner and the forum.

Thus, expressly noting the absence of any guidance from this Court as to the scope of the relatedness standard, the California Supreme Court proceeded to define its own standard, to wit, a "substantial connection or nexus" between forum contacts and the litigation. (*Vons, supra*, App. 20a, 24a).[7] Applying this standard, the California Supreme Court found that in the instant case, Vons had successfully demonstrated a substantial nexus between WRMI's business contacts in California (to wit, the Franchise Agreements with Foodmaker) and Vons' tort claims.

Significantly, in a concurring opinion six members of the *Vons* court discussed and expressly rejected the various other relatedness tests which have been applied by the federal courts.

Specifically, the *Vons* court rejected as too narrow the "proximate cause" test applied by the Court of Appeal in this action. In doing so, the court disapproved two California appeals court cases upon which the appellate court had relied in choosing and applying the proximate cause standard.[8] The *Vons* court also expressly rejected the "but-for" test adopted by the Ninth Circuit as "too broad and amorphous." Lastly, the *Vons* court rejected the "substantive relevance test" which it apparently perceived to be different from the proximate cause test, as "inappropriate" and "overly restrictive." (*Vons, supra*, App. 52a)

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[7] This "substantial connection or nexus" language was first utilized by the California Supreme Court in *Cornelison v. Chaney* (1976) 16 Cal.3d 143, 545 P.2d 264.

[8] *Circus Circus Hotels, Inc. v. Superior Court* (1981) 120 Cal.App.3d 546 and *Sklar v. Princess Properties International, Ltd.* (1987) 194 Cal.App.3d 1202.

C. Courts and commentators have frequently commented on the need for guidance from this Court as to the relatedness prong of minimum contacts analysis

Thus, it appears that the only thing that is clear about the relatedness standard is its lack of clarity. The problem has been recognized and extensively discussed by both courts and commentators.

The First Circuit has, on several occasions, expressed frustration at the lack of guidance on this important jurisdictional issue. In *United Electrical, Radio & Machine Workers of America v. 163 Pleasant Street Corporation* 960 F.2d 1080 (1992), the court commented:

> Specific jurisdiction may be asserted where the cause of action arises directly out of, or relates to, the defendant's forum-based contacts. [citations] The cases that address the question of when this phenomenon occurs tend to be fact-specific. [citations] Overall, courts have played the tortoise in designing an analytic framework aimed at constructing a reasoned answer to this conundrum. (*Id.*, at 1088-1089)

Two years later, the First Circuit again commented on the lack of guidance in this area. In *Ticketmaster-New York, Inc. v. Alioto* 26 F.3d 201 (1st c. 1994) the First Circuit began its due process minimum contacts analysis by commenting that:

> This case probes the frontiers of the doctrine of personal jurisdiction in a context fraught with constitutional implications. . . . (*Ibid.*)
>
> [T]he requirement that a suit arise out of, or be related to, the defendant's in-forum activities comprises the least developed prong of the due process inquiry. [citations omitted]. We know to a certainty only that

> the requirement focuses on the nexus between the defendant's contacts and the plaintiff's cause of action.
>
> The [U.S. Supreme] Court has kept its own counsel on the question of whether, on the one hand, the two halves of the relatedness requirement are merely two ways of expressing the same thought or, on the other hand, they are meant to import different values in to the jurisdictional equation. (*Id.*, at 206, citing *Helicopteros* 466 U.S. at 415, n. 10 (reserving question).)

Similarly, many commentators have noted the confused state of the law in this area and expressed frustration over the situation. A small sampling follows.

> . . . a substantial degree of uncertainty still exists as to the constitutional limits of specific jurisdiction. [fn. omitted] Most notable is the confusion concerning the interpretation of "arise from or relate to". Much constitutional weight rides on the application of this one phrase. . . . [T]he propriety of asserting jurisdiction can, under the proper circumstances, rest solely on the interpretation of the "arise from or relate to" requirement."
>
> The "arise from or relate to" requirement is the essence of specific person jurisdiction because it defines the necessary relationship between the defendant and the forum state. [fn. omitted] It follows, therefore, that a misapplication of "arise from or relate to" is tantamount to a misapplication of due process. [fn. omitted] For this reason, if courts are to recognize, and they should, that the limits of constitutional due process should not vary from one court to another, courts must

> have a firm and consistent understanding of "arise from or relate to."

Maloney, *Specific Personal Jurisdiction and the "Arise From or Relate to" Requirement . . . What Does It Mean?* 50 Wash. & Lee L. Rev. 1265, 1270-71 (1993).

> Texas's confusion over specific and general jurisdiction is not surprising. Because of the Supreme Court's lack of guidance concerning whether a cause of action "arises from" contacts or whether the contacts are "continuous and systematic," many lower courts manipulate the parameters of specific and general jurisdiction to reach the desired result in a particular case.

Albright, *In Personam Jurisdiction: A Confused and Inappropriate Substitute for Forum Non Conveniens* 71 Tex.L.Rev. 351, 380 (1992).

See also Twitchell, *Burnham and Constitutionally Permissible Levels of Harm* 22 Rutgers L.J. 659, 666, stating that some courts use "a sort of jurisdictional stew" in which purposefulness, relatedness, convenience and state interest are all considered to determine whether the assertion of jurisdiction is "fair".

Similarly, in Rose, *Related Contacts and Personal Jurisdiction: The "But For" Test* 82 Calif.L.Rev. 1545 (1994), the commentator noted that "personal jurisdiction is widely regarded as a problematic, uncertain, and murky area of the law" and he identifies "the notion of related contacts" as a particular "policy conundrum[ ]."

CONCLUSION

It has been noted that although the *Helicopteros* decision acknowledged the existence of "relatedness" issues, the majority of the Court "wished to wait for a case in which the 'arise from or relate to' questions faced them squarely."[9] This is that case.

For all the foregoing reasons, this Court is respectfully requested to grant review in order to clarify this important due process issue.

Dated: May 2, 1997

Respectfully submitted,

LASKERO & ASSOCIATES
MAZUR & MAZUR
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Attorneys for Petitioner

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[9] Maloney, *supra*, 50 Wash. & Lee L. Rev. (1993)

S049039

IN THE SUPREME COURT OF CALIFORNIA

THE VONS COMPANIES INCORPORATED,
Cross-Complainant and Appellant,

v.

SEABEST FOODS INCORPORATED, et al.,
Cross-Defendants and Respondents.

Ct. App. 2/5 B094228
San Diego
Super. Ct. No. JCCP3101

SUPREME COURT
FILED
DEC. 12, 1996
Robert Wandruff, Clerk

We consider in this case the issue whether California courts may exercise personal jurisdiction over owners of "fast food" restaurant franchises located in another state, in litigation stemming from several incidents of food poisoning that occurred in the foreign jurisdiction. We conclude that the franchisees had sufficient contacts with California through their relationship with their California franchiser, and that the tort claims alleged against the franchisees in a cross-complaint filed in a California action stemming from the food poisoning incidents were sufficiently related to the franchisees' contacts in California, to justify this state's exercise of jurisdiction over the franchisees.

I

In 1993, customers of Jack-in-the-Box restaurants in several states, including Washington, suffered from exposure

to Escherichia coli (E. coli) bacteria traced to hamburgers sold at the restaurants. Many fell ill and some died.

Foodmaker, of which Jack-in-the-Box is a division, is a Delaware corporation with its principal place of business in San Diego, California. It blamed the E. coli contamination on its meat suppliers, including the Vons Companies, Inc. (Vons). Vons processed hamburger patties in its El Monte, California plant and shipped them to Foodmaker for use in Jack-in-the-Box restaurants.

Litigation soon followed. Eighty-five Jack-in-the-Box franchisees from California and other states, whose customers had *not* been injured, sued Foodmaker, Vons, and other meat processors, in an action brought in the San Diego County Superior Court. The action stated causes of action for negligence, breach of implied warranty, breach of contract, and other claims, and sought substantial damages for loss of business caused by the adverse publicity that followed the E. coli outbreak.

Foodmaker cross-complained against Vons and the other meat suppliers. Foodmaker's cross-complaint alleged breach of warranty and of contract, as well as negligence, negligent interference with economic relations, and other claims. It alleged the suppliers delivered contaminated meat to Foodmaker, and that this conduct exposed Foodmaker to liability both to injured customers and to franchisees who had lost business after the E. coli outbreak.

Vons then filed the cross-complaint that is the subject of this appeal.[1] It asserted causes of action against Foodmaker, several slaughterers and meat packers, and several Jack-in-the-Box franchisees, including Seabest Food, Inc. (Seabest) and Washington Restaurant Management Inc. (WRMI).

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[1] For convenience, references to "the cross-complaint" refer to Vons's cross-complaint.

Seabest, beginning in 1988, and WRMI, beginning in 1987, were owners of Jack-in-the-Box franchises in Washington State at which E. coli contamination had injured or killed Jack-in-the-Box customers.[2]

Vons's cross-complaint alleged the injuries caused by the E. coli contamination would have been avoided had Foodmaker and its franchisees cooked the hamburgers at the proper temperature. Specifically, it alleged Foodmaker, Seabest, and WRMI had failed to follow proper procedures for cooking the meat, and that their procedures were "systematically deficient when measured against industry standards." In addition, it alleged Foodmaker, Seabest, and WRMI had failed to follow government standards for cooking the meat at a proper temperature, that Foodmaker had failed to inform its franchisees of the applicable government regulations, that the "standard" grills used by Foodmaker, Seabest, and WRMI were below the industry norm and lacked various safety features, and that Foodmaker, Seabest, and WRMI failed to require adequate qualifications and training for their cooks.

The cross-complaint asserted causes of action against Seabest and WRMI for negligence, negligent and intentional interference with economic advantage, and comparative and equitable indemnity. Vons sought damages for its own loss of business, as well as indemnification for any

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[2]Seabest and WRMI are Washington corporations to which individual franchisees of Foodmaker assigned their franchise agreements. All restaurant locations involved in the franchise agreements were located in Washington State. The individual franchisees served as corporate directors of Seabest and WRMI, and it does not appear there were any shareholders other than the individual franchisees. The assignments provided the individual franchisees would remain obligated to perform on the franchise agreements. Foodmaker does not permit franchises to be sold directly to corporations. For convenience, we refer to Seabest and WRMI as the franchisees.

liability that might be imposed upon it for injury to Jack-in-the-Box customers in other actions, and for liability that might be imposed upon it for the claims of the franchisees in the current action.

Seabest and WRMI appeared specially and moved to quash service of process on the ground of lack of personal jurisdiction. The trial court considered evidence of Seabest's contacts with California, including the circumstance that a majority of its board of directors lived in California and had signed franchise agreements, leases, and a security agreement with Foodmaker in California. One of Seabest's leases and its security agreement with Foodmaker listed the franchisee's home office address as being in Granada Hills, California. Although most of its business with Foodmaker was conducted with Foodmaker's Washington office, Seabest conducted some business by mail and telephone with Foodmaker at Foodmaker's corporate headquarters in San Diego. Seabest officers attended multiple training sessions offered by Foodmaker in California, and met with Foodmaker representatives in San Diego before entering the franchise agreements, and again thereafter to resolve a dispute unrelated to the present litigation.

Significantly, the franchise agreements for Seabest's 10 Washington restaurants provided that any contract disputes would be litigated in California under California law, and that the franchisees would meet Foodmaker's specifications in providing training, following cooking procedures, and using equipment. The agreement specified that the franchisees must purchase ingredients, materials, and supplies from sources approved by Foodmaker, which might include Foodmaker itself. In fact, Seabest purchased most of its food and all of its hamburger patties from Foodmaker. It received delivery of food from Foodmaker's Washington warehouse, but was sent invoices by (and sent payments to) the San Diego Foodmaker headquarters — at first by mail, and then

through a Colorado telephone exchange. Seabest also made its royalty and rent payments to Foodmaker in the same manner. Seabest employed a San Diego accountant to prepare the monthly financial statement it was required to send to Foodmaker headquarters in San Diego. During high volume periods, Seabest remitted up to $450,000 a month to Foodmaker.

Foodmaker inspectors from California occasionally inspected Seabest's restaurants, and Foodmaker once sent an auditor from its San Diego office to audit Seabest's books. Seabest also made equipment purchases from Foodmaker in California. Payment for equipment purchases for one restaurant totaled $233,217.

WRMI had less extensive contacts with Foodmaker in California, conducting almost all of its business with Foodmaker through Foodmaker's Washington office. Nonetheless, WRMI's three franchise agreements were negotiated in California, and one of the individual franchisees executed original franchise agreements in California. These franchise agreements provided that contract disputes would be litigated in California under California law, and also controlled the franchisee's purchases of ingredients, training, equipment, and cooking procedures in the same manner as the Seabest agreements. In addition, the president of WRMI met once with Foodmaker representatives in San Diego to negotiate regarding two initial franchises, and attended training on another occasion in San Diego. He also had telephone conversations regarding the potential sale of a franchise with a manager employed at Foodmaker's San Diego office. His application to purchase a third franchise was forwarded to the San Diego office of Foodmaker, and that office in turn returned the approved franchise and an assignment of the individual franchises to the WRMI corporation.

The president of WRMI attended yearly meetings in California with Foodmaker dealing with WRMI business, and also traveled to California six to eight times to represent Jack-in-the-Box franchisees other than WRMI in policy discussions with Foodmaker. He received monthly accounts receivable statements from the San Diego office. He purchased 70 percent of his food supplies and all of his hamburger patties from Foodmaker. He was sent invoices by Foodmaker's Washington center and received his deliveries from that location, but he received a monthly statement for his food purchases from Foodmaker in San Diego. The hamburger patties delivered to him from that center originally came from California suppliers. He originally mailed his royalty, rent, and food payments to Foodmaker's San Diego address, and later paid the bills by telephone to a bank located in California. He also sent monthly income statements and a yearly accounting to Foodmaker in San Diego. His employees had occasional phone conversations with Foodmaker in California regarding financial matters, and he occasionally received updated training materials from Foodmaker in California. After the E. coli outbreak, he had conversations with Foodmaker in California regarding an agreement to terminate his franchises, as noted below. Finally, two WRMI employees received training in California on one occasion, and WRMI purchased cash registers and other sales tracking equipment directly from Foodmaker in California.

There also was evidence that during litigation involving the motions to quash, Foodmaker reached an agreement with Seabest and WRMI under which the franchisees assigned the franchises back to Foodmaker. In addition, Foodmaker agreed to defend and indemnify the franchisees to the extent their insurers refused to defend and indemnify them against personal injury claims brought by injured

Jack-in-the-Box customers, as well as the claims brought in the present litigation.[3]

The trial court granted the motions to quash, and the Court of Appeal affirmed, also ordering Vons to pay Seabest's and WRMI's costs on appeal. We granted Vons's petition for review.

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[3]Vons requests that we take judicial notice, augment the record, or make a factual determination under Code of Civil Procedure section 909, so that the record in these proceedings will include deposition testimony given after the judgment was rendered in this matter, as well as manuals referred to in the franchise agreement but not presented to the trial court, in order to demonstrate that the franchise agreement required Seabest and WRMI to follow certain specifications in cooking its hamburgers. Vons seeks to include this new evidence in order to rebut the factual claims of Seabest and WRMI that the franchise agreements did not dictate how the franchisees were to prepare hamburgers at their restaurants. Seabest and WRMI oppose the motion.

Augmentation does not function to supplement the record with materials not before the trial court. (*People v. Brooks* (1980) 26 Cal.3d 471, 484; *Rebney v. Wells Fargo Bank* (1990) 220 Cal.App. 3d 1117, 1139, fn. 7; 1 Eisenberg et al., Cal. Practice Guide: Civil Appeals & Writs (The Rutter Group 1995) ¶ 5:134, p. 5-32.) Reviewing courts generally do not take judicial notice of evidence not presented to the trial court. Rather, normally "when reviewing the correctness of a trial court's judgment, an appellate court will consider only matters which were part of the record at the time the judgment was entered." (*Reserve Insurance Co. v. Pisciotta* (1982) 30 Cal.3d 800, 813.) No exceptional circumstances exist that would justify deviating from that rule, either by taking judicial notice or exercising the power to take evidence under Code of Civil Procedure section 909. (Cf *Reserve Insurance Co. v. Pisciotta, supra*, 30 Cal.3d at p. 813; *In re Conservatorship of Estate of Hart* (1991) 228 Cal.App.3d 1244, 1257; *Monsan Homes, Inc. v. Pogrebneak* (1989) 210 Cal.App.3d 826, 830; *De Young v. Del Mar Thoroughbred Club* (1984) 159 Cal.App.3d 858, 863, fn. 3.) The request is denied.

II

A

California's long-arm statute authorizes California courts to exercise jurisdiction on any basis not inconsistent with the Constitution of the United States or the Constitution of California. (Code Civ. Proc., § 410.10.) A state court's assertion of personal jurisdiction over a nonresident defendant who has not been served with process within the state comports with the requirements of the due process clause of the federal Constitution if the defendant has such minimum contacts with the state that the assertion of jurisdiction does not violate " 'traditional notions of fair play and substantial justice.' " (*International Shoe Co. v. Washington* (1945) 326 U.S. 310, 316 (*International Shoe*); see also *Burnham v. Superior Court* (1990) 495 U.S. 604, 618-619 (*Burnham*).)

Recent decisions of the United States Supreme Court describe two bases for limiting a state's exercise of personal jurisdiction over nonresidents. The first recognizes limits on a state's assertion of jurisdiction designed to ensure fairness to nonresident defendants. The second recognizes the mutual limits on the states' sovereign power to exercise jurisdiction in a federal system.

As the high court has explained, each individual has a liberty interest in not being subject to the judgments of a forum with which he or she has established no meaningful minimum "contacts, ties or relations." (*Burger King Corp. v. Rudzewicz* (1985) 471 U.S. 462, 471-472 (*Burger King*) [approving Florida court's exercise of jurisdiction over franchise dispute involving Michigan franchisee and Florida franchiser], quoting *International Shoe, supra*, 326 U.S. at p. 319.) As a matter of fairness, a defendant should not be "haled into a jurisdiction solely as the result of 'random,'

'fortuitous,' or 'attenuated' contacts." (*Burger King, supra*, 471 U.S. at p. 475.)

The concept of minimum contacts also requires states to observe certain territorial limits on their sovereignty. It "ensure[s] that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." (*World-Wide Volkswagen Corp. v. Woodson* (1980) 444 U.S. 286, 292 (*World-Wide Volkswagen*).) As the high court has explained, "the Framers . . . intended that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State, in turn, implied a limitation on the sovereignty of all of its sister States . . . ." (*Id.* at p. 293.)

Personal jurisdiction may be either general or specific. A nonresident defendant may be subject to the *general* jurisdiction of the forum if his or her contacts in the forum state are "substantial . . . continuous and systematic." (*Perkins v. Benguet Mining Co.* (1952) 342 U.S. 437, 445, 446; see also *Helicopteros Nationales de Columbia v. Hall* (1984) 466 U.S. 408, 414-415 (*Helicopteros*) In such a case, "it is not necessary that the specific cause of action alleged be connected with the defendant's business relationship to the forum." (*Cornelison v. Chaney* (1976) 16 Cal.3d 143, 147 (Cornelison); see also *Helicopteros, supra*, 466 U.S. at p. 414.) Such a defendant's contacts with the forum are so wide-ranging that they take the place of physical presence in the forum as a basis for jurisdiction. (See *Burnham, supra*, 495 U.S. at p. 618 (plur. opn. by Scalia, J.).) No question of general jurisdiction arises, however, in the case before us.

If the nonresident defendant does not have substantial and systematic contacts in the forum sufficient to establish general jurisdiction, he or she still may be subject to the *specific* jurisdiction of the forum, if the defendant has purposefully availed himself or herself of forum benefits

(*Burger King, supra*, 471 U.S. at pp. 472-473), and the "controversy is related to or 'arises out of' a defendant's contacts with the forum." (*Helicopteros, supra*, 466 U.S. at p. 414; see also *Burger King, supra*, 471 U.S. at p. 472.) It is this type of personal jurisdiction that Vons seeks to establish in this case.

The United States Supreme Court has described the forum contacts necessary to establish specific jurisdiction as involving variously a nonresident who has "purposefully directed" his or her activities at forum residents (*Burger King, supra*, 471 U.S. at p. 472), or who has "purposefully derived benefit" from forum activities (*id.* at p. 473), or " 'purposefully avail[ed himself or herself] of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.' " (*Id.* at p. 475) The court also has referred to the requisite forum contact as involving a nonresident defendant who " 'deliberately' has engaged in significant activities with a State [citation] or has created 'continuing obligations' between himself and residents of the forum [citation]" (*id.* at pp. 475-476), concluding that in such cases the defendant "manifestly has availed himself of the privilege of conducting business [in the forum], and because his activities are shielded by 'the benefits and protections' of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well." (*Id.* at p. 476.)

According to the high court, it is fair to subject defendants to specific jurisdiction, because their forum activities should put them on notice that they will be subject to litigation in the forum. That is, "[w]hen a corporation 'purposefully avails itself of the privilege of conducting activities within the forum State,' [citation] it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks

are too great, severing its connection with the state." (*World-Wide Volkswagen, supra*, 444 U.S. at p. 297.) This element of fair warning gives " 'a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.' " (*Id.* at p. 297.)

The United States Supreme Court has explained, for example, that a state properly may exercise specific jurisdiction when it " 'asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State' and those products subsequently injure forum consumers. [Citation.] Similarly a publisher who distributes magazines in a distant State may fairly be held accountable in that forum for damages resulting there from an allegedly defamatory story. [Citations.]" (*Burger King, supra*, 471 U.S. at p. 473.) And in the case of litigation arising out of an ongoing franchise agreement, the high court has found proper a Florida court's exercise of specific jurisdiction over a franchise operator located in Michigan, emphasizing that "parties who 'reach out beyond one state and create continuing relationships and obligations with citizens of another state' are subject to regulation and sanctions in the other State for the consequences of their activities." (*Ibid.*)

A state may exercise specific jurisdiction over a nonresident who purposefully avails himself or herself of forum benefits, because the state has "a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors. [Citations.] Moreover, where individuals 'purposefully derive benefit' from their interstate activities [citation] it may well be unfair to allow them to escape having to account in other States for consequences that arise proximately from such

activities." (*Burger King, supra*, 471 U.S. at pp. 473-474.) Further, "because 'modern transportation and communications have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity,' it usually will not be unfair to subject him to the burdens of litigating in another forum for disputes relating to such activity." (*Id.* at p. 474.)

Finally, in analyzing the exercise of specific jurisdiction, "[o]nce it has been decided that a defendant purposefully established minimum contacts within the forum state, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.' " (*Burger King, supra*, 471 U.S. at p. 476, quoting *International Shoe, supra*, 326 U.S. at p. 320.) Courts may evaluate the burden on the defendant of appearing in the forum, the forum state's interest in adjudicating the claim, the plaintiff's interest in convenient and effective relief within the forum, judicial economy, and "the 'shared interest of the several States in furthering fundamental substantive social policies.' " (*Burger King, supra*, 471 U.S. at p. 477.)

This court examined the problem of specific jurisdiction in *Cornelison, supra*, 16 Cal.3d 143. There we held that a California resident could sue a Nebraska defendant in California for wrongful death in connection with an accident that occurred in Nevada. Because the defendant was engaged in the business of hauling goods by truck and made fairly frequent deliveries in California, and the accident occurred while he was en route to California for further deliveries, we found a "substantial nexus between plaintiff's cause of action and defendant's activities in California." (*Id.* at p. 149.) We explained that the appropriate inquiry is whether the plaintiff's cause of action "arises out of or has a substantial connection with a business relationship defendant has purposefully established with California." (*Ibid.*)

We commented that if, as we found, the defendant's activities are not so wide ranging as to justify general jurisdiction, "then jurisdiction depends upon the quality and nature of his activity in the forum *in relation to* the particular cause of action. In such a situation, the cause of action must arise out of an act done or transaction consummated in the forum, or defendant must perform some other act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws. Thus, as the relationship of the defendant with the state seeking to exercise jurisdiction over him grows more tenuous, the scope of jurisdiction also retracts, and fairness is assured by limiting the circumstances under which the plaintiff can compel him to appear and defend. The crucial inquiry concerns the character of defendant's activity in the forum, whether the cause of action *arises out of or has a substantial connection* with that activity, and upon the balancing of the convenience of the parties and the interests of the state in assuming jurisdiction." (*Id* at pp. 147-148, fn. omitted, italics added, citing *Hanson v. Denkla* (1958) 357 U.S. 235, 250-253; *McGee v. International Life Ins. Co.* (1952) 355 U.S. 220, 223; and *Buckeye Boiler Co. v. Superior Court* (1969) 71 Cal.2d 893, 898-899.)

B

Applying the teaching of *Burger King, supra*, 471 U.S. 462, and *Cornelison, supra*, 16 Cal.3d 143, we must determine whether the courts of this state properly may exercise specific jurisdiction over Seabest and WRMI.

When a defendant moves to quash service of process on jurisdictional grounds, the plaintiff has the initial burden of demonstrating facts justifying the exercise of jurisdiction. (*State of Oregon v. Superior Court* (1994) 24 Cal.App.4th 1550, 1557.) Once facts showing minimum contacts with

the forum state are established, however, it becomes the defendant's burden to demonstrate that the exercise of jurisdiction would be unreasonable. (*Burger King, supra*, 471 U.S. at pp. 476-477.) When there is conflicting evidence, the trial court's factual determinations are not disturbed on appeal if supported by substantial evidence. (*Felix v. Bomoro Kommanditgesellschaft* (1987) 196 Cal.App.3d 106, 111.) When no conflict in the evidence exists, however, the question of jurisdiction is purely one of law and the reviewing court engages in an independent review of the record. (*Great-West Life Assurance Co. v. Guarantee Co. of North America* (1988) 205 Cal.App.3d 199, 204.)

We conclude that this state may exercise specific jurisdiction over Seabest and WRMI. Indeed, this case closely resembles *Burger King, supra*, 471 U.S. 462, which, we believe, largely governs the outcome here. As we explain, the cross-defendants here, like the defendants in *Burger King*, purposefully availed themselves of benefits in the forum by reaching out to forum residents to create an ongoing franchise relationship.

In *Burger King, supra*, 471 U.S. 462, a Florida corporation sued its Michigan franchisee in the federal district court in Florida for breach of the franchise agreement. The franchisee appeared specially and claimed that because he was a Michigan resident doing business only in Michigan, and because the claim did not "arise" in Florida, the district court lacked jurisdiction over him. The Supreme Court disagreed. It held the franchisee, through his continuing contractual obligations to the Florida corporation, purposefully had availed himself of the privilege of conducting business in Florida. The high court declared that although a nonresident defendant does not necessarily become subject to the specific jurisdiction of the forum state simply by entering into a contract with a resident of the forum (*Burger King, supra*, 471 U.S. at p. 478), the exercise of specific

jurisdiction over the out-of-state franchisee was appropriate in the case before it because of ongoing franchise relations very similar to those involved here.

As already noted, the court declared that "with respect to interstate contractual obligations, we have emphasized that parties who 'reach out beyond one state and create continuing relationships and obligations with citizens of another state' are subject to regulation and sanctions in the other State for the consequences of their activities.' " (*Burger King, supra*, 471 U.S. at p. 473.) The court observed that the dispute in question grew out of a contract that had a "substantial connection" with the forum state, (*Id.* at p. 479, italics omitted.) The court acknowledged that the franchisee was supervised directly by the Michigan Burger King office, but noted that, as in the present case, the franchisee made monthly payments to (and agreed that his operations would be regulated by) corporate headquarters in the forum state. It was important to the court that the Michigan franchisee, although he had no physical presence in Florida, had agreed to an ongoing contractual relationship under which it was established that any disputes would be governed by Florida law. (*Id.* at p. 481.)

The court found it significant that, as in the case before us, the franchisee knew he was affiliating himself with a business with headquarters in the forum state, and that his operations would be supervised by that headquarters. (*Burger King, supra*, 471 U.S. at p. 480.) The franchisee had reached out beyond Michigan and negotiated with a Florida corporation to take advantage of the significant benefits that would flow from affiliation with the Burger King name and organization. The court stated: "In light of [the franchisee's] voluntary acceptance of the long-term and exacting regulation of his business from Burger King's Miami headquarters, the 'quality and nature' of his relationship to the company in Florida can in no sense be viewed as

'random,' 'fortuitous,' or 'attenuated.' " (*Id.* at p. 480.) The court cautioned that no mechanical test exists to determine whether a defendant purposefully has availed himself or herself of forum benefits by entering into a contract in the forum. (*Id.* at p. 478-479.) Rather, the court "emphasized the need for a 'highly realistic' approach" in which the court examines prior negotiations, future consequences of the contract the terms of the contract, and the parties' dealings with each other. (*Id.* at p. 479.)

The court's discussion in *Burger King, supra*, 471 U.S. 462, makes it clear that if Foodmaker had sued Seabest and WRMI in California in a breach of contract action based on the franchise agreements, it would have had no difficulty in establishing California's jurisdiction. As in Burger King, the franchisees here reached out to the California Foodmaker business, and clearly sought out and benefited from the California business's multi-state name-recognition and organization. The franchisees purposefully undertook ongoing contractual obligations to the California business, and agreed that any disputes arising out of the contract not only would be governed by California law, but also would be *litigated in California*. Therefore, it was not only predictable that they might face litigation in California — it was *settled* that any litigation on the contract would occur in this forum. In addition, Seabest and WRMI made substantial and continuing purchases from Foodmaker in California. (See *Rocklin De Mexico, S.A. v. Superior Court* (1984) 157 Cal.App.3d 91, 95, 98 [asserting regular purchasing contacts would induce a reasonable defendant to foresee the possibility of being brought into court in the forum].)

If Foodmaker were to seek indemnification from Seabest or WRMI for any liability Foodmaker suffered as a result of Seabest's or WRMI's undercooking of meat in Washington, the contacts between the Washington franchisees and this forum and Foodmaker also were such that California's

exercise of jurisdiction would be proper over the Washington franchisees. The franchise agreement, after all, provided that the Washington franchisees would prepare their products in conformance with Foodmaker's regulations, and any alleged failure to do so would create an injury that arose from the contract and from the Washington franchisees' contacts with California.

That a court would have no difficulty finding specific jurisdiction in such hypothetical lawsuits brought by Foodmaker demonstrates that Seabest and WRMI purposefully availed themselves of the benefits of doing business with the California Foodmaker enterprise. They formed a substantial economic connection with this state. To require them to answer Vons's claim, as well, is not to allow a third party unilaterally to draw them into a connection with the state; rather, it was Seabest and WRMI who established the connection. Nor would the exercise of jurisdiction in this state over Vons's claim depend on "random, fortuitous or attenuated" contacts. Rather, as we have seen, Seabest and WRMI had an ongoing commercial relationship in this forum.

We recognize that the court in *Burger King, supra*, 471 U.S. 462, did not specifically discuss the further requirement that the claim "arise out of" or be "related to" the defendant's forum activity in order to warrant the exercise of specific jurisdiction, and that the meaning of that requirement is implicated in the present case.[4] We also recognize

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[4]The high court has declined to clarify the relatedness element of specific jurisdiction. (See, e.g., *Carnival Cruise Lines v. Shute* (1991) 499 U.S. 585, 589 [declining to reach the issue whether a cruise company's contacts in Washington state were sufficiently connected to a slip and fall injury that occurred on board a ship, when the vessel was located outside the forum, to warrant the exercise of specific jurisdiction; the court decided the case on a narrower forum selection clause in the contract]; *Helicopteros, supra*, 466 U.S. at p. 415, fn. 10 [because the

that in *Burger King*, the claim involved a contract action that arose *directly* from the forum contact, that is, the ongoing franchise relationship, and that the litigation involved the same parties as were involved in the forum contact. The present case is distinguishable from *Burger King* in that the cross-complainant was not a party to the franchise contract, and thus the claim is not on the contract as was the dispute in *Burger King*. This distinction, however, does not render the exercise of specific jurisdiction improper.

A claim need not arise directly from the defendant's forum contacts in order to be sufficiently related to the contact to warrant the exercise of specific jurisdiction. Rather, as long as the claim bears a substantial connection to the nonresident's forum contacts, the exercise of specific jurisdiction is appropriate. The due process clause is concerned with protecting nonresident defendants from being brought unfairly into court in the forum, on the basis of random contacts. That constitutional provision, however, does not provide defendants with a shield against jurisdiction when the defendant purposefully has availed himself or herself of benefits in the forum. The goal of fairness is well served by the standard we originally set out in *Cornelison, supra*, 16 Cal.3d 143, that is, there must be a *substantial connection* between the forum contacts and the plaintiff's claim to warrant the exercise of specific jurisdiction. (*Id.* at p. 148.)

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parties did not argue the issue, the majority in *Helicopteros* did not reach the question whether "a forum's exercise of personal jurisdiction in a situation where the cause of action 'relates to,' but does not 'arise out of,' the defendant's contacts with the forum should be analyzed as an assertion of specific jurisdiction"; but see *id* at p. 425 (dis. opn. of Brennan, J.) [asserting that although the claim did not arise out of forum activities, it was related to those activities, which were relevant to establish specific jurisdiction].)

As we said in *Cornelison*, and as the high court suggested in *International Shoe, supra*, 326 U.S. 310, for the purpose of establishing jurisdiction the intensity of forum contacts and the connection of the claim to those contacts are inversely related. (See *International Shoe, supra*, 326 U.S. at p. 317 [" 'Presence' in the state . . . has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on . . . . Conversely it has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities . . . are not enough to subject it to suit on causes of action unconnected with the activities there."].) The explanation we set out in *Cornelison* bears repeating: "[A]s the relationship of the defendant with the state seeking to exercise jurisdiction over him grows more tenuous, the scope of jurisdiction also retracts, and fairness is assured by limiting the circumstances under which the plaintiff can compel him to appear and defend. The crucial inquiry concerns the character of defendant's activity in the forum, whether the cause of action *arises out of or has a substantial connection with that activity*, and the balancing of the convenience of the parties and the interests of the state in assuming jurisdiction." (*Cornelison, supra*, 16 Cal.3d at p. 148, fn. omitted, italics added; see also *Northrup King Co. v. Compania Productora Semillas* (8th Cir. 1995) 51 F.3d 1383, 1388 [nature of defendant's contacts with forum "closely interrelated" with question of connection of contacts with plaintiff's cause of action]; Richman, *Review Essay, Part II — A Sliding Scale to Supplement the Distinction Between General and Specific Jurisdiction* (1984) 72 Cal.L.Rev. 1328, 1340 et seq. [viewing intensity of defendant's contacts and relationship of contacts to claim on a continuum, so that the greater the intensity of forum activity, the lesser the relationship required between the contact and the claim].) When, as here, the defendants sought out

and maintained a continuing commercial connection with a California business, it is not necessary that the claim arise directly from the defendant's contacts in the state. Rather, as is discussed further below, because of the defendants' relationship with the forum, it is not unfair to require that they answer in a California court for an alleged injury that is substantially connected to the defendants' forum contacts.

Seabest argues that the standard we set forth in *Cornelison, supra*, 16 Cal.3d 143, and the result we reached in that case, are "at or beyond the outermost limits of what the Due Process Clause will countenance." (See also Brilmayer, *How Contacts Count; Due Process Limitations on State Court Jurisdiction* (1980) Sup.Ct.Rev. 77, 84 (*How Contacts Count*) [criticizing *Cornelison* for considering contacts in the forum that are merely similar to the nonforum conduct that injured the plaintiff].) It argues such a formulation erases the distinction between general and specific jurisdiction, and is inconsistent with cases decided by the United States Supreme Court "insisting on a direct and concrete nexus between the forum, the specific allegations in a lawsuit and the defendant's particularized activity in the forum as related to the allegations in the lawsuit to support the exercise of specific jurisdiction"

We disagree. The high court has not provided precise criteria regarding the particular issue before us — that is, the necessary relationship between the plaintiff's cause of action and the defendant's contacts in the forum. It has stated the applicable standard in much broader terms than those proposed by Seabest, however, requiring only that a plaintiff's cause of action be "related to or 'arise[ ] out of' a defendant's contacts with the forum." (*Helicopteros, supra*, 466 U.S. at p. 414; see also *Burger King, supra*, 471 U.S. at p. 472.) To require that there be a substantial nexus or connection between the plaintiff's cause of action and the defendant's forum contacts is in no way inconsistent with

this standard, or with the rationale the high court has provided for the exercise of specific jurisdiction. Nor does such a standard eliminate the distinction between general and specific jurisdiction, for it retains the requirement that specific jurisdiction be based upon a connection between the plaintiff's claim and the defendant's forum contacts.

The formulation expressed in *Cornelison, supra*, 16 Cal.3d 143 — that the state may exercise specific jurisdiction if there is a substantial connection or nexus between forum contacts and the litigation — is not unique. The same flexibility and emphasis on the nature of the relationship between the claim and the forum contacts is demonstrated in the approach taken by the Seventh Circuit in *In re Oil Spill by Amoco Cadiz Off Coast of France* (7th Cir. 1983) 699 F.2d 909 (*Amoco Cadiz*). There, the Court of Appeals, in an opinion by then Judge, now Chief Judge Posner, approved the federal district court's exercise of jurisdiction in Illinois over a Spanish shipbuilder in a case in which French citizens injured by an oil spill off the coast of France sued the shipbuilder in tort for negligent and defective design of the ship. The French citizens also sued affiliates of the shipowner's parent company for damage caused by negligent operation of the ship, and the affiliates of the parent company cross-claimed against the shipbuilder for indemnity.

The court concluded that the Spanish shipbuilder's contacts with Illinois, that is the course of negotiations and the signing of the shipbuilding contract in Illinois, were sufficiently connected to the oil spill off the coast of France to warrant the exercise of specific jurisdiction with respect to the claims of the French citizens injured by the spill. The court observed that although the French plaintiffs were not party to the contract negotiations in Illinois — just as Vons was not in contract with Seabest or WRMI — they were harmed by the shipowner's operation of the ship in its

defective condition "and the negotiation and signing of the contract were critical steps in the chain of events that led to the oil spill." (*Amoco Cadiz, supra*, 699 F.2d at p. 917.) Noting that it was particularly reasonable to permit the court in Illinois to exercise jurisdiction to allow all claims arising out of a single catastrophe to be litigated in the same court, it concluded that the exercise of jurisdiction over the Spanish shipbuilder did not offend notions of due process. (*Ibid.*)

Similarly, the Sixth Circuit has explained that the relatedness criterion requires only that the plaintiff's claim have a substantial connection with the defendant's forum activities to warrant the exercise of specific jurisdiction. (*Third Nat. Bank in Nashville v. Wedge Group, Inc.* (6th Cir. 1989) 882 F.2d 1087, 1091.) In that case, the defendant was a Delaware corporation that owned a subsidiary that did business in Tennessee and was involved in the subsidiary's financial transactions in Tennessee. Plaintiff Third National Bank sued the Delaware corporation in Tennessee to enforce Third National Bank's rights as a secured creditor under contracts the defendant's subsidiary had entered into with it. Defendant argued the action did not arise out of its own business contacts with the forum, so that the Tennessee court could not properly exercise jurisdiction. The federal appeals court disagreed, stating that the relatedness element of specific jurisdiction "does not require that the cause of action formally 'arise from' defendant's contacts with the forum; rather, this criterion requires only 'that the cause of action, of whatever type, *have a substantial connection with* the defendant's in-state activities' . . . 'Only when the operative facts of the controversy are not related to the defendant's contact with the state can it be said that the cause of action does not arise from that [contact].' " (*Ibid.*) The defendant's contacts in the forum had a "close relationship" with the action, because defendant interjected itself into loan negotiations between the bank and the subsidiary,

was a party to a tax sharing agreement that formed a part of the bank's claim, and deposited funds with the bank to induce it to enter into the loan agreement with the subsidiary. (*Ibid.*)

The federal circuit also has chosen to apply a flexible standard, deciding in *Akro Corp. v. Luker* (Fed. Cir. 1995) 45 F.3d 1541 that a California patent holder was subject to jurisdiction in an action for declaratory judgment of noninfringement in Ohio, because the patent holder had sought to protect the patent in Ohio and because the patent holder had entered into an exclusive licensing agreement with an Ohio company not involved in the litigation. As for the relationship between the action and the defendant's forum contacts, the court observed that forum contacts need not be directed at the plaintiff in order to warrant the exercise of specific jurisdiction, and that the "arising out of or relating to" standard is in the disjunctive, and is intended as a relaxed, flexible standard, rather than one requiring that the plaintiff's claim arise out of the forum contact in any narrow sense. (*Id.* at p. 1547.) The court also suggested that the more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim. (*Ibid.*; see also *Northrup King v. Compania Productura Semillas, supra,* 51 F.3d at pp. 1387-1388 [considering "connection" between contacts and breach of contract cause of action; although some forum contacts, including meetings to discuss possible future business relations, were not directly related to the breach of contract claim, they were an "essential part of the course of dealing" between the parties leading to the contract]; *Francosteel Corp. v. M/V Charm* (11th Cir. 1994) 19 F.3d 624, 627 [requiring simply that the defendant's contacts be "related" to the plaintiff's claim, but deciding that an international shipping contract calling for delivery of goods in the forum was insufficient when none of the events giving rise to the cause of action took place in the forum, none of the parties

was a forum resident, the contract was negotiated outside the forum, and the loss occurred when the ship went down in international waters, before delivery]; *Vermeulen v. Renault, U.S.A. Inc.* (11th Cir. 1992) 985 F.2d 1534, 1546, 1550 [contacts must be "related" to the plaintiff's claim or have given rise to it; Renault's design of an automobile for the United States market, advertising of the vehicle in the forum, and maintenance of a distribution network in the forum were sufficiently related to a products liability action, because they were "inextricable links" by which the forum resident obtained the vehicle].)

In sum, considering the rationale of the specific jurisdiction doctrine, the language in which the high court has described the doctrine, and the federal cases discussed above applying the doctrine, we conclude that a nonresident defendant may be subject to the specific jurisdiction of this state if the defendant purposefully has availed itself of forum benefits through an ongoing franchise agreement and there is a substantial nexus or connection between the defendant's forum activities and the plaintiffs claim.

Applying this standard, Vons has demonstrated a substantial nexus between WRMI's and Seabest's business contacts in California and Vons's tort claims against WRMI and Seabest. It is consistent with due process for Seabest and WRMI to be required to appear in the action in this forum; not only did they purposefully avail themselves of forum benefits through their ongoing, comprehensive and profitable contacts with the forum, but the plaintiff's claims against them bore a substantial relationship to their forum contact for two reasons.

First, the relationship Seabest and WRMI established in the forum drew these defendants and Vons into a relationship as alleged joint tortfeasors, with some joint liability and rights of indemnification. WRMI and Seabest established an ongoing contractual relationship with Foodmaker in Cali-

fornia, and agreed to buy food supplies from Foodmaker (or from suppliers approved by Foodmaker) and to follow Foodmaker's directions in preparing food in the Washington restaurants. Seabest and WRMI actually bought all their hamburger patties from Foodmaker, which in turn was supplied by Vons and other purveyors. Although it was Foodmaker's Washington distribution center that delivered the meat to Seabest and WRMI, Seabest and WRMI paid Foodmaker's San Diego corporate headquarters for the supplies over a period of years. Accordingly, it appears that Seabest and WRMI bought Vons's contaminated meat from Foodmaker pursuant to the franchise agreement. It was pursuant to the ongoing contractual arrangement that the contaminated meat was delivered to Seabest and WRMI. Because of the contractual relationship in California, Vons, Seabest, and WRMI became, it is alleged, joint or concurrent tortfeasors with respect to the injured franchisees and consumers — Vons for supplying the contaminated meat, and Seabest and WRMI for failing to cook it properly. The contract in California put Vons, Seabest, and WRMI in a position to become jointly liable under California law for harm caused by the meat (Civ. Code, §§ 1431, 1431.2; 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, §§ 48, 51, pp. 110, 112), thereby giving Vons a potential claim for indemnification against Seabest and WRMI. (See 5 Witkin, Summary of Cal. Law, *supra,* § 89, p. 162.)[5]

Second, the franchise relationship, with its uniform standards for cooking food, training employees, and buying equipment, itself was a source of injury to Vons. To the extent that, as the complaint alleged, Foodmaker's procedures were "systematically deficient when measured by industry standards," and, as indicated by evidence offered

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[5]Of course, it is not settled that California law would apply with respect to the claim for indemnification, because the choice-of-law decision has yet to be made.

below by Vons, these procedures were imposed on Seabest and WRMI pursuant to the franchise agreement, the contractual contact in California was a contributing cause of the injuries alleged to have been inflicted by Seabest and WRMI upon restaurant customers and other franchisees — as to which Vons assertedly had concurrent liability and some right to indemnification — as well as a contributing cause of the injuries to reputation claimed by Vons, because its meat was blamed for the illness and death of customers.[6] Accordingly, both the negligence claims and the claim for indemnification arose out of the contractual relationship between Foodmaker, WRMI, and Seabest, a relationship that had a substantial connection to California.

The Court of Appeal below focused on an asserted lack of relationship between Vons, on the one hand, and Seabest and WRMI, on the other. The court suggested this lack of relationship was critical in determining whether the claim was sufficiently related to the forum contacts to permit the exercise of specific jurisdiction in California. Contrary to the Court of Appeal's thesis, however, the defendant's forum activities need not be directed at the *plaintiff* in order to give rise to specific jurisdiction. (See, e.g., *Keeton v. Hustler Magazine, Inc.* (1984) 465 U.S. 770, 775 [publisher that distributes magazines to the public in a distant state may be held accountable in that forum for damage to victim of defamation], *Cornelison, supra*, 16 Cal.3d 143 [jurisdiction found although the defendant's business activities in California were not directed at the accident victim]; *Akro Corp.* v.

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[6]WRMI's claim that Vons first raised in this court the theory that the franchise agreement actually caused the injuries is not supported by the record. WRMI's contention that the manual directing franchisees as to required cooking procedures is not part of the record, and hence that Vons cannot prove the procedures were inadequate systemwide, appears to be directed to the merits of Vons's substantive claim, rather than to the jurisdictional question. It is the latter question, of course, that is before us.

Luker, supra, 45 F.3d at p. 1547 ["plaintiff need not be the forum resident toward whom any, much less all, of the defendant's relevant activities were purposefully directed"]; *Amoco Cadiz, supra*, 699 F.2d at p. 917 [French victims of oil spill may bring a tort action against a Spanish shipbuilder in an Illinois court; their claim "could readily be said to arise from the negotiating and signing, in Illinois, of the [shipbuilding] contract" even though the negotiations obviously were not directed at the plaintiffs].) The United States Supreme Court has stated more than once that the nexus required to establish specific jurisdiction is between the defendant, *the forum*, and the litigation (*Helicopteros, supra*, 466 U.S. at p. 411; *Shaffer v. Heitner* (1977) 433 U.S. 186, 204) — not between the plaintiff and the defendant. For the purpose of deciding whether a defendant has minimum contacts or purposefully has availed itself of forum benefits, the relevant contacts are said to be with the *forum*, because it is the defendant's choice to take advantage of opportunities that exist in the forum that subjects it to jurisdiction. (*Asahi Metal Industry Co. v. Superior Court* (1987) 480 U.S. 102, 112 (plur. opn. by O'Connor, J.); *Burger King, supra,* 471 U.S. at p. 475, 479; *Helicopteros, supra*, 466 U.S. at p. 414; *Shaffer v. Heitner, supra*, 433 U.S. at p. 204.)

Seabest argues none of its physical contacts in California — by phone, visit or letter — are relevant to the alleged injury, that is the illness caused by the undercooking of meat in Washington. It argues Vons's claims have no connection with California, asserting that these claims are based solely upon a violation of Washington law — that violation consisting of a failure to cook hamburgers to the proper internal temperature. This argument views both Vons's claim and Seabest's contacts with this forum far too narrowly. Seabest, like the defendant in *Burger King, supra*, 471 U.S. 462, purposefully availed itself of an ongoing contractual relationship with a business in the forum, deriving substantial advantage from that business's multi-state reputation and

the standardization provided for under the franchise agreement. This forum contact bore a substantial relationship to the claimed injury to Vons's business and reputation, because Seabest acquired Vons's tainted meat from Foodmaker pursuant to purchases under the franchise agreement and cooked it according to the standards provided under the franchise agreement. Far from basing its claim solely or primarily upon an allegation that the franchisees violated Washington law, Vons's cross-complaint alleged that the franchisees failed to cook the meat properly because of deficiencies in the cooking and training procedures and equipment requirements provided for by Foodmaker on a systemwide basis.[7]

WRMI argues strenuously that there was no substantial nexus between its California contacts and Vons's negligent handling of the meat. Conceding that a defendant does not necessarily have to have had a prior relationship with the

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[7]To the extent Seabest also may be understood to argue that the contacts of the individual franchisees before its incorporation cannot be attributed to it, the argument is questionable. It is generally true that the defendant's own contacts are considered for the purpose of jurisdiction (*Burger King, supra*, 471 U.S. at pp. 474-475; *Sibley v. Superior Court* (1976) 16 Cal.3d 442, 447-448), but corporate veils may be pierced and agents' activities may be considered in appropriate cases. (See, e.g., *Calder v. Jones* (1984) 465 U.S. 783, 789-790; *Seagate Technology v. A. J. Kyogo Co.* (1990) 219 Cal.App.3d 696, 701-702; *Wisconsin Elec. Mfg. Co., Inc. v. Pennant Products* (7th Cir. 1980) 619 F.2d 676, 677-678; 1 Casad, Jurisdiction in Civil Actions (2d ed. 1991) § 4.03 [4], p. 4-13.) In Seabest's case, the corporate owners were identical to the individual franchisees (except that one individual had died), and indeed the individuals remained liable on the franchise agreement. (See I Casad, Jurisdiction in Civil Actions, *supra*, § 4.03[5][d], p. 4-140 [court may impute contacts of corporation's predecessor if successor liable for obligations of predecessor].) In any event, in finding the requisite contacts, we rely only upon contacts that occurred after the incorporation, and upon the franchise agreement itself, by which Seabest obviously was bound.

plaintiff in order for specific jurisdiction to be established, WRMI asserts that cases finding jurisdiction despite a lack of prior relationship between the plaintiff and the defendant turn upon a finding of a substantial nexus between the defendant's forum activities and the plaintiff's claim — a nexus that WRMI argues is missing in this case. In *Cornelison, supra*, 16 Cal.3d 143, for example, WRMI claims we found a substantial relationship because the accident arose out of the very activity that formed the essential basis of the defendant's contacts with California. Here, by contrast, WRMI contends — as does Seabest — that its improper cooking of hamburgers in Washington had nothing directly to do with its forum-based activities. Although it concedes that the franchise agreement gave Foodmaker the right to dictate WRMI's food preparation methods, WRMI argues this was of minimal significance. Rather, it contends, the benefit that WRMI bargained for when it entered into the agreement was not the privilege of having Foodmaker supervise it, but the benefit gained from association with a regionally known chain. Moreover, WRMI asserts that by entering into the agreement, it did not seek to conduct any business in California, did not own property in California, has no employees in California, and never has contracted or done business directly with Vons. Finally, WRMI claims Vons failed to demonstrate that Foodmaker actually directed Seabest or WRMI to use substandard training, equipment, and cooking methods.

We are not persuaded. The relationship of Vons's claim to WRMI's forum activities is less attenuated than the relationship of the accident victim's claim to the defendant's forum activities in *Cornelison, supra*, 16 Cal.3d 143. We did not hold in that case that *only* an injury caused by the very activity that formed the defendant's forum contacts would give rise to specific jurisdiction. Indeed, under WRMI's reading of the case, a state never could exercise jurisdiction over a tort claim arising from a contractual contact. Such a

result, however, would be inconsistent with the fairness rationale underlying specific jurisdiction, by which courts recognize that defendants who purposefully avail themselves of forum benefits may have to answer claims against them in the forum. Nor would it be consistent with Chief Judge Posner's analysis in *Amoco Cadiz, supra*, 699 F.2d 909, or with the other federal cases discussed above, which recognize that a tort claim arising out of a contractual relationship may be sufficiently connected to the forum contact to give rise to specific jurisdiction.

Further, WRMI's claim that it did no business in California and derived no economic benefit from this state is belied by the ongoing contractual relationship it entered into with Foodmaker, a relationship by which WRMI sought to secure to itself the benefits the California business could provide in terms of ready-made goodwill for WRMI's restaurants, as well as an easy-to-follow format for establishing and running these businesses. In any event, jurisdiction is not limited to litigation over bargained-for contract benefits when a tort claim is at stake. As in *Amoco Cadiz, supra*, 699 F.2d 909, in which the contractual activities in the state sufficed to establish specific jurisdiction even though they did not relate directly to the oil spill off the coast of France, subjecting defendants to jurisdiction is not unfair simply because the plaintiff's claim did not involve one of the specific benefits defendant anticipated would flow from doing business in the forum. Finally, it is obvious that Vons is not required to *prove* the allegations of its cross-complaint in order to establish that jurisdiction is proper in this forum. (*Edmunds v. Superior Court* (1994) 24 Cal.App.4th 221, 228.)

C

In opposition to the conclusion we reach, the Court of Appeal determined (and Seabest and WRMI argue) that

the connection between the forum contacts of these cross-defendants and Vons's asserted claims against them fails to meet various tests of "relatedness" that they assert are required by the doctrine of specific jurisdiction. In addition, Vons urges us to adopt a more expansive test of "relatedness" than the one we have embraced. The various theories offered by the Court of Appeal and the parties are not persuasive, however, at least in the context of the type of ongoing franchise relationship that has been demonstrated in this case. We must recall that the United States Supreme Court has rejected the use of "talismanic jurisdictional formulas" (*Burger King, supra*, 471 U.S. at p. 485), stating that " 'the facts of each case must [always] be weighed' in determining whether personal jurisdiction would comport with 'fair play and substantial justice.' " (*Id.* at pp. 485-486.)

The Court of Appeal declared that it did not need to determine whether Seabest and WRMI had "purposefully availed" themselves of the privilege of conducting business activities in this state, because even if they had, the causes of action against them did not "arise out of" or "relate to" those activities. The appellate court reached this conclusion because of its view that Seabest's and WRMI's contacts with California did not *cause* Vons's claim. The court believed it was required to apply an extremely narrow test of causation in deciding whether there was a sufficient connection between the activity and the cause of action. Under the test formulated by the Court of Appeal, unless the forum contact *proximately caused* the occurrence that injured the plaintiff, the connection between the contacts and the claim is insufficient to permit the exercise of specific jurisdiction.

The Court of Appeal relied principally upon two cases in attempting to demonstrate the proper application of such a test. As will appear, we disapprove the reasoning of these cases to the extent they are inconsistent with this opinion. In

the first case, *Circus Circus Hotels, Inc.* v. *Superior Court* (1981) 120 Cal.App.3d 546 (*Circus Circus*), California residents brought a tort cause of action in this state against a Nevada hotel corporation. They sought damages for losses they incurred while on vacation in Nevada, alleging that the hotel's negligence was the cause of a burglary of their hotel room. They alleged that the Nevada hotel's substantial advertising campaign in California induced them to patronize the hotel. The reviewing court found the connection between the cause of action and the Nevada hotel's activities in California insufficient to warrant this state's exercise of jurisdiction. The court observed: "It could not be seriously contended that the defendant's advertising was the *proximate cause* of the burglary . . . ." (*Id.* at p. 569, italics added.)

As additional support, the Court of Appeal below relied upon *Sklar* v. *Princess Properties International, Ltd.* (1987) 194 Cal.App.3d 1202 (*Sklar*). In that case, the plaintiff, a California resident, filed a tort action in this state against a Bermuda hotel corporation, alleging personal injuries sustained in a fall at the hotel. The plaintiff alleged the hotel contracted through its agents for plaintiff's accommodations in a California transaction and engaged in advertising in California. The Court of Appeal found insufficient the connection between the activity alleged to have occurred in the forum state and plaintiff's cause of action. It said: "It cannot seriously be contended that sale to plaintiff in California of accommodations at defendant's hotel in Bermuda was the *proximate cause* of plaintiff's personal injuries . . . ." (*Id.* at p. 1208, italics added.)

Applying the standard it derived from these cases, the Court of Appeal explained: "In the present case, defendants' act or omission alleged to have caused damage to Vons and for which it seeks indemnification is the undercooking of hamburgers in the state of Washington. It cannot seriously

be contended that but for defendants [*sic*] activities in California . . . the hamburger patties would not have been undercooked in Washington." The Court of Appeal also emphasized that defendants had no relationship with Vons, and that, "[i]n short, the causal link between defendants' . . . franchise relationship with Foodmaker and the alleged failure to properly cook hamburgers in Washington is too attenuated to say the injury arose from the activities of Seabest and WRMI in this state." As is evident although the Court of Appeal used the term "but for" in discussing whether an adequate relationship had been shown between the forum contacts and the plaintiff's claim, the test actually applied was a proximate cause test as used in *Circus Circus, supra*, 120 Cal.App.3d 546, and *Sklar, supra*, 194 Cal.App.3d 1202, whose focus is whether the forum contact was the legal cause of the plaintiff's injuries.

The Court of Appeal's holding that jurisdiction cannot exist unless the alleged injury was proximately caused by the contacts in the forum state — in the sense that the contacts were the immediate preceding legal cause of plaintiff's injury — is untenable, at least in the franchise setting. To require that the injury be proximately caused by the forum contact is to require that the injury "arise out of" the forum contact in the strictest sense. Such a requirement is inconsistent with the formulation that appears in *Burger King* and *Helicopteros*, which, as noted above, states in the disjunctive that jurisdiction is proper when litigation results from alleged injuries that "arise out of *or relate to*" forum activities. (*Burger King, supra*, 471 U.S. at p. 472, italics added; *Helicopteros, supra*, 466 U.S. at p. 414, fn. 9; see also *International Shoe, supra*, 326 U.S. at p. 319 ["The exercise of that privilege [forum activities] may give rise to obligations, and, so far as those obligations arise out of *or are connected with* the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be

undue."]) Similarly, such a requirement is inconsistent with the relevant standard in *Cornelison*, *supra*, 16 Cal.3d at page 148, wherein we stated, also in the disjunctive, that the proper inquiry is "whether the cause of action arises out of *or has a substantial connection* with that [forum.] activity." (Italics added.)

A proximate cause test as applied in the foregoing Court of Appeal cases would prohibit the exercise of specific jurisdiction in most contract actions arising out of ongoing interstate contractual relations — the sort of case in which specific jurisdiction is most obviously appropriate. This is so because the contractual relationship usually cannot be said to *cause* a party to fail to live up to the terms of the contract. If only an injury proximately caused by the forum contact could give rise to specific jurisdiction, the United States Supreme Court would have reached a different result in *Burger King*, *supra*, 471 U.S. 462, because the forum activity in that case (the ongoing contractual relationship in Florida) did not *cause* the injury (the franchisee's failure to make franchise payments in Michigan). Similarly, the Court of Appeal's formulation would have produced a different result in *Cornelison*, *supra*, 16 Cal.3d 143, where the forum activities (deliveries inside California) did not *cause* the injury (the accident in Nevada).

The United States Supreme Court long ago rejected the notion that personal jurisdiction might turn upon mechanical tests such as a proximate cause test. (*International Shoe*, *supra*, 326 U.S. at p. 319 ["It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not cannot be simply mechanical or quantitative .... Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure."];

Burger King, supra, 471 U.S. at p. 478 [in discussing whether a contract may be a sufficient contact, the court rejected any mechanical test or " 'conceptualistic . . . theories of the place of contracting or of performance"]; see also *Kulko v. California Superior Court* (1978) 436 U.S. 84, 91, 92; *Shaffer Heitner, supra*, 433 U.S. at p. 204; *Cornelison, supra*, 16 Cal.3d at p. 150 [holding that "[t]he question of jurisdiction cannot be decided by the application of some precise formula," and rejecting "a rigid test in favor of a flexible approach grounded in the quality and nature of the activity of the defendant in the state seeking to exercise jurisdiction over him, fairness to the parties, and the orderly administration of the law"].)

Such a proximate cause test also is inconsistent with the fairness rationale underlying the specific jurisdiction doctrine. A person who purposefully avails himself or herself of the benefits of doing business in the forum state must be prepared to answer lawsuits that relate to his or her activity there. (*Burger King, supra*, 471 U.S. at p. 472.) The due process clause recognizes the individual's liberty interest in structuring his or her business relations so as to avoid jurisdiction in another forum. (*ibid.*; see also *World-Wide Volkswagen, supra*, 444 U.S. at p. 297), but a narrow proximate cause test of the relationship between the plaintiff's claim and the defendant's forum contacts is unnecessary to ensure that interest. Indeed, such a test would shield nonresidents who take advantage of forum benefits from the duty to answer related claims in the forum for injury the nonresident defendant has caused. As the high court has declared, however, "the Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed." (*Burger King, supra*, 471 U.S. at p. 474.)

An individual who, in the forum, has entered into an ongoing contractual relationship of the nature described in

Burger King, supra, 471 U.S. 462, or shown in the present case, has chosen not to structure its business relations to avoid that forum's jurisdiction, but rather has chosen to affiliate with the forum, and reasonably must anticipate exposure to litigation in the forum beyond claims that are in a narrow sense proximately caused by forum activities. This is readily apparent because the high court has established that it is not the *particular injury* in the forum state that must be foreseeable to the defendant, but rather " 'the foreseeability that is critical to the due process analysis . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.' " (*Id.* at p. 474.)

Finally, the narrow proximate cause test as applied by the Court of Appeal in the present case has been criticized as improperly importing common law policies limiting tort liability into the entirely unrelated field of jurisdiction. (Rose, *Related Contacts and Personal Jurisdiction: The "But For" Test* (1994) 82 Cal.L.Rev. 1545, 1577 (*Related Contacts*).) Although it is used mechanically in jurisdiction cases, the test operates as an expression of policy in tort cases. As one commentator has observed: "It is particularly difficult to regard proximate or 'legal' causation as a true definition of relatedness because proximate causation usually reflects a policy-based legal filter on 'but for' causation. As Dean Prosser wrote, '[t]he term "proximate cause" is applied by the courts to those more or less undefined considerations which limit liability even where the fact of causation is clearly established.' " (*Ibid*, fn. omitted.)

Accordingly, we reject the proximate cause test applied by the Court of Appeal in this case, and by the courts in *Sklar, supra*, 194 Cal.App.3d 1202, and *Circus Circus, supra*, 120 Cal.App.3d 546, because it is inconsistent with the rationale underlying specific jurisdiction in the context of an ongoing franchise relationship.

An alternative to the narrow proximate cause test employed by the Court of Appeal, and one that both Vons and WRMI may be understood to urge in support of their own conflicting conclusions, is an analysis focused upon whether a defendant's forum contacts are a "but for" cause of the plaintiff's claim. Although WRMI argues that Vons's claims fail this test, the test is a broad one that usually is understood as *supporting* expansive exercise of jurisdiction over nonresidents. (See, e.g., Rose, *Related Contacts, supra*, 82 Cal.L.Rev. at p. 1577; Note, *Specific Personal Jurisdiction and the "Arise From or Relate to" Requirement . . . What Does it Mean?* (1993) 50 Wash & Lee L.Rev. 1265, 1277 (*Note*).)

For example, in *Dialysis at Sea, Inc. v. Superior Court* (1989) 216 Cal.App.3d 788 (*Dialysis at Sea*), a nonresident defendant contracted in California with California residents for special medical services aboard a cruise ship. Defendants provided negligent medical care on board ship outside of California, injuring the plaintiff. The Court of Appeal refused to apply the narrow proximate cause test of *Sklar, supra*, 194 Cal.App.3d 1202, and *Circus Circus, supra*, 120 Cal.App.3d 546. It observed that under such a test contractual relations formed in one state never could be the basis for jurisdiction over a related tort claim for injuries inflicted in another state. (*Dialysis at Sea, supra*, 216 Cal.App.3d at p. 795.) The appellate court also noted the absence of a "direct connection" between the forum activities in *Sklar, supra*, 194 Cal.App.3d 1202, and *Circus Circus, supra*, 120 Cal.App.3d 546, and the causes of action asserted therein. It observed, by contrast, that the contract for medical care on board ship in the case before it put the out-of-state defendant within "striking distance" of the plaintiff, allowing the defendant tortiously to injure the California plaintiff. The court declared that the contract was the "but for" cause of the injury, stating that "[i]n other words, 'but for' the contract plaintiff and the decedent would not have been on

the cruise and the decedent would not have been subjected to [the defendant's] allegedly negligent medical treatment." (216 Cal.App.3d at p. 795; see also *State of Oregon v. Superior Court, supra*, 24 Cal.App.4th 1550 [applying same test to permit exercise of jurisdiction in California when Oregon university recruited California athlete in California, and medical malpractice in Oregon allegedly contributed to athlete's death].)[8]

Several federal court opinions also employ a "but for" test in this context. For example, the Ninth Circuit Court of Appeals found that a Florida cruise line's solicitation of business in Washington state was related sufficiently to an injury on board the cruise ship in international waters to warrant the exercise of jurisdiction in Washington, because in the absence of the solicitation the plaintiffs would not have taken the cruise and the injury would not have occurred. (*Shute v. Carnival Cruise Lines* (9th Cir. 1990) 897 F.2d 377, revd on other grounds *sub nom. Carnival Cruise Lines v. Shute, supra*, 499 U.S. 585.) The appeals court found jurisdiction although the cruise line had no offices or exclusive agents in Washington, and was not registered to do business there, but merely advertised in the local media, mailed brochures and paid commissions to travel agents there, and conducted promotional seminars in the state. Only about 1 percent of the cruise line's sales took place in Washington.

The Ninth Circuit Court of Appeals declared that a "but for" test is "consistent with the basic function of the 'arising out of' requirement — it preserves the essential distinction between general and specific jurisdictions," in that it "pre-

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[8] As will appear, we are not persuaded that the "but for" test provides an appropriate general standard, and consequently the reasoning of *Dialysis at Sea, supra,* 216 Cal.App.3d 788, and *State of Oregon* v. *Superior Court, supra*, 24 Cal.App.4th 1550, is disapproved to the extent it is inconsistent with this opinion.

serves the requirement that there be *some* nexus between the cause of action and the defendant's activities in the forum." (*Shute v. Carnival Cruise Lines, supra*, 897 F.2d at p. 385, italics added.) It rejected any narrower reading of the "arising out of" requirement as unnecessary to protect defendants from unreasonable assertions of jurisdiction, explaining that the third element of the specific jurisdiction analysis — that is, the reasonableness requirement — provides the necessary protection. (*Ibid.*) The court reasoned that any narrower application of the "arising out of" element would shield defendants who purposefully have availed themselves of forum benefits, and therefore would be "an unwarranted departure from the core concepts of 'fair play and substantial justice' which are central to the due process analysis" underlying the exercise of specific jurisdiction. (*Id.* at p. 386.)

Thereafter, in *Ballard v. Savage* (9th Cir. 1995) 65 F.3d 1495, 1500, the Ninth Circuit reaffirmed *Shute v. Carnival Cruise Lines, supra*, 897 F.2d 377, after the high court's reversal of the latter opinion on other grounds. (See *Carnival Cruise Lines v. Shute, supra*, 499 U.S. 585.) The Ninth Circuit found that a duped investor's fraud claim against an Austrian bank that was used as a repository for deposits in a Ponzi scheme was sufficiently related to the bank's general banking activities in the forum to warrant the exercise of specific jurisdiction, although the bank's general banking activities in the forum clearly did not cause the injury. The court found that the "but for" test was satisfied because, had the bank not done business in the United States, the creator of the Ponzi scheme would not have used it in connection with the fraudulent scheme. (*Ballard v. Savage, supra*, 65 F. 3d at p. 1500; see also *Prejean v. Sonatrach, Inc.* (5th Cir. 1981) 652 F.2d 1260, p. 1270, fn. 21 ["Logically, there is no reason why a tort cannot grow out of a contractual contact. In a case like this, the contractual contact is a 'but for' causative factor for the tort since it brought the parties

within tortious 'striking distance' of each other. While the relationship between a tort suit and contractual contact is certainly more tenuous than when a tort suit arises from a tort contact that only goes to whether the contact is by itself sufficient for due process, not whether the suit arises from the contact."].)

We are not persuaded it is productive to focus upon whether the injury would have occurred "but for" the forum contacts, at least when an ongoing franchise relationship is the forum contact. As applied in certain circumstances, this standard may be too lax and theoretically may include any historical cause of the plaintiff's injuries. For example, as Seabest notes, if the defendant is a lawyer who has received his or her legal education in the forum, that legal education may be said to be a "but for" cause of any malpractice the lawyer commits anywhere in the nation, yet it hardly seems a sufficient basis for the forum to exercise jurisdiction. One commentator has criticized the "but for" test as permitting a virtually unlimited exercise of jurisdiction. (Brilmayer, *Related Contacts and Personal Jurisdiction* (1988) 101 Harv. L.Rev. 1444, 1462 (*Related Contacts*); Brilmayer, *How Contacts Count, supra*, 1980 Sup.Ct.Rev. at p. 84.) As Professor Lea Brilmayer points out, one's birth is a historical "but for" cause of one's every action, yet the location of one's birth normally should not determine personal jurisdiction. (Brilmayer, *Related Contacts, supra*, 101 Harv. L.Rev. at p. 1462.)

Moreover, as another commentator has pointed out, the concept of "minimum contacts" is not compatible with the elements of causation — normally physical factors — that are involved in tort claims. Just as with the proximate cause test, "[a] further problem with the 'but for' causation is its mismatch with the social activities that are part of the causal chain in typical personal jurisdiction disputes. In tort causal chains, one usually encounters physical phenomena

such as a speeding car, a careless shotgun blast, or a baby food spill on a supermarket floor. Conversely, contacts in personal jurisdiction cases are generally social acts, like advertising directed at forum residents. In the latter instance, the causal link between those acts and the injuries necessarily passes through some conscious decision on the plaintiff's part," thereby interrupting the causal chain, though not necessarily making the exercise of jurisdiction unreasonable. (Rose, *Related Contacts, supra*, 82 Cal.L.Rev. at p. 1571-1572.) Further, even in the context of "but for" causation in the tort field, it generally has been accepted that the search for "but for" causation is not a meaningful one when two or more concurrent, independent causes exist, because the tortfeasor does not escape liability for his or her negligence on the ground that the same harm would have occurred without such negligence. (*Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1049.) The same may be true in the context of jurisdiction, such that if a forum contact is but one of several concurrent, independent causes of plaintiffs injury, it nonetheless may be fair to permit the state to exercise jurisdiction over the defendant.

Significantly, the high court has not been concerned with causation in this context. Rather, it has spoken of a *relationship* between the cause of action and the contacts in the forum, and has used relatively broad terms to describe the necessary relationship. (See *International Shoe, supra*, 326 U.S. at p. 319; see also *Burger King, supra*, 471 U.S. 462, 472; *Helicopteros, supra*, 466 U.S. at p. 414, fn. 9.) In *International Shoe*, for example, the court found the defendant's sales activities within the state were such as to subject it to the forum's jurisdiction, without requiring proof that the sales activities caused the events underlying the claim within the state (a claim for unemployment insurance

contribution for the sales representatives).[9] (*International Shoe, supra*, 326 U.S. 310.) In *Burger King*, too, as we have pointed out, the Michigan defendant's breach of contract was not *caused* by his contacts with the Florida corporation, even though the claim certainly arose out of the contract. (*Burger King, supra*, 471 U.S. 462.) And in *Cornelison*, we found a Nevada trucking company's history of contacts with California sufficient to establish jurisdiction, although these contacts did not literally *cause* the accident in Nevada that was the subject of the lawsuit. (*Cornelison, supra*, 16 Cal.3d 143.) The foregoing authorities call into question the utility of importing a causation test from tort law into the area of jurisdiction in order to evaluate a matter that fundamentally is one of relationship and fairness, rather than causation.

Again, beginning with *International Shoe, supra*, 326 U.S. 310, the high court has cautioned repeatedly that the question whether a nonresident defendant has sufficient contacts with the forum, so as to make fair the exercise of jurisdiction, cannot be answered by resort to mechanical tests. (*Id* at p.319; see also *Burger King, supra*, 471 U.S. at p. 478; *Kulko v. California Superior Court, supra*, 436 U.S. at pp. 91, 92; *Shaffer v. Heitner, supra*, 433 U.S. 186, 204.) We echoed this concern in *Cornelison, supra*, 16 Cal.3d 143, stating that specific jurisdiction does not turn upon any precise formula. (*Id.* at p. 150; see also *Edmunds v. Superior Court, supra*, 24 Cal.App.4th at pp. 230-231; *Pennsylvania Health & Life Ins. Guarantee Assn. v. Superior Court* (1994) 22 Cal.App.4th 477, 481.) The question whether the facts are sufficient to justify the exercise of

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[9] Although the court in *International Shoe, supra*, 326 U.S. 310, did not use the specific/general jurisdiction nomenclature, the case has been understood as establishing the theoretical basis for specific jurisdiction. (Von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis* (1966) 79 Harv. L.Rev. 1121, 1141-1163; Rose, *Related Contacts, supra*, 82 Cal.L.Rev. at p. 1550.)

specific jurisdiction is answered fundamentally by considering the goal of fairness. A "but for" test is overly mechanical and fails to concentrate on the central issue presented by a motion to quash for lack of specific jurisdiction — that is, whether the defendant's forum contacts and the plaintiff's claim are related sufficiently so that it is *fair* to subject the defendant to jurisdiction in the forum.

Seabest urges alternatively that we declare that the relationship required between the forum contact and the plaintiff's claim must be direct and concrete. it appears Seabest would have us limit the forum to exercising jurisdiction over nonresident defendants for, in Seabest's words, "alleged wrongdoing that took place in the forum." Specifically, Seabest urges that we adopt the view championed by Professor Brilmayer, that specific jurisdiction is legitimate under recent high court authority only when a forum contact is *substantively related* to the plaintiff's cause of action — that is, when conduct constituting a forum contact that took place *in* the forum normally would be pleaded under state substantive law applicable to the plaintiffs cause of action. (See Brilmayer, *How Contacts Count, supra*, 1980 Sup. Ct. Rev. at p. 82; Brilmayer et al., *A General Look at General Jurisdiction* (1988) 66 Tex. L.Rev. 721, 738 (*General Jurisdiction*).) If a fact alleged to be a forum contact would be irrelevant in a domestic dispute, the argument continues, it is not a "related" contact merely because a nonresident defendant is involved. (*Ibid.*)

In support of this thesis, Professor Brilmayer asserts that the constitutional underpinning for specific jurisdiction is the state's sovereign power to regulate conduct *within* the state. (Brilmayer et al., *General Jurisdiction, supra*, 66 Tex. L.Rev. at pp. 739, 740; Brilmayer, *How Contacts Count, supra*, 1980 Sup. Ct. Rev. at pp. 85-86 [arguing that the concept of state sovereignty permits exercise of jurisdiction over nonresidents because of the "state's right to regulate

activities occurring within the state"].) She explains: "A test of *substantive relevance* helps to identify those situations in which the state is using the litigation to regulate local activity. Conduct that has no legal relevance [to the claim] is unlikely to give rise to any plausible state interest in regulation. Consequently, if such legally irrelevant conduct is the only local contact, then a state cannot predicate jurisdiction upon any purported desire to regulate local activities." (Brilmayer et al., *supra*, 66 Tex. L.Rev at p. 740, italics added.)

Seabest argues that the "substantive relevance" standard now represents the majority view in the federal circuits. Our research, however, shows otherwise. In the First Circuit Court of Appeals, the court expressly has repudiated the claim that its earlier decisions adopted the substantive relevance doctrine as a matter of federal constitutional law. (*Ticketmaster-New York, Inc. v. Alioto* (1st Cir. 1994) 26 F.3d 201, 206, fn. 8.) While the cases from the First Circuit Court of Appeals cited by Seabest express various standards,[10] we observe that in a case decided after those cited by Seabest, the First Circuit Court of Appeals has approved the exercise of jurisdiction when forum contacts were not

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[10]See, e.g., *United Elec. Workers v. 163 Pleasant Street Corp.* (1st Cir. 1992) 960 F.2d 1080, 1089 (forum contacts must be both cause in fact and legal cause of plaintiff's injury in order to support specific jurisdiction and "the defendant's in-state conduct must form an 'important, or [at least] material, element of proof' in the plaintiff's case"); *Sawtelle v. Farrell* (1st Cir. 1995) 70 F.3d 1381, 1389-1390 (suggesting that in a tort claim, the contacts must constitute the negligent conduct that caused the plaintiff's injury); see also *Marino v. Hyatt Corp.* (1st Cir. 1986) 793 F.2d 427, 430 (no jurisdiction because in-state conduct "would hardly be an important, or perhaps even a material, element of proof' in the cause of action); but see *Fournier v. Best Western Treasure Island Resort* (1st Cir. 1992) 962 F.2d 126, 127, in which the court simply asks whether plaintiffs injuries "arise out of" defendant's in-state conduct).

substantively related to the plaintiff's claim. (*Nowak v. Tak How Investments, Ltd.* (1st Cir. 1996) 94 F.3d 708.) In that case, plaintiff's decedent drowned in a swimming pool in the defendant's Hong Kong hotel. The court determined that the Hong Kong hotel corporation's solicitation of the patronage of Massachusetts residents and its negotiations conducted by fax over the terms of a group rate contract established a sufficient relationship between the forum contacts and the plaintiff's claim to justify the exercise of specific jurisdiction in Massachusetts, although the plaintiff's injury occurred in Hong Kong. It appears evident as well that the solicitation was not substantively related to the plaintiff's claim. The court also observed that although it favors a proximate cause standard of relatedness, it also recognizes that such a test is unduly restrictive in some cases. (*Id.* at p. 715.) The court concluded that although jurisdiction necessarily is reasonable if premised upon a forum "contact that is a legal cause of the injury underlying the controversy — *i.e.*, that 'form[s] an "important or [at least] material, element of proof" in the plaintiff's case' [citation]" — jurisdiction nevertheless may be exercised appropriately in cases *not* meeting this standard. (*Ibid.*) The court declared: "If the resident is harmed while engaged in activities integral to the relationship the corporation sought to establish, we think the nexus between the contacts and the cause of action is sufficiently strong to survive the due process inquiry at least at the relatedness stage." (*Id.* at pp. 715-716; see also *Pritsker v. Yari* (1st Cir. 1994) 42 F.3d 53, 61 [relatedness element a "flexible, relaxed standard"]; *Ticketmaster-New York, Inc. v. Alioto, supra*, 26 F.3d 201, 205-206, 206, fn. 8 [indicating standard should be flexible].)

Seabest also cites cases from the Second, Fourth, Seventh, and Eighth Circuit Courts of Appeals in support of its position. (See, e.g., *Gelfand v. Tanner Motor Tours, Ltd.* (2d Cir. 1964) 339 F.2d 317, 321-322 [declining to exercise

jurisdiction based upon in-state sale of bus tickets, because the alleged negligence took place entirely outside the forum]; *City of Virginia Beach v. Roanoke River Basin Ass'n* (4th Cir. 1985) 776 F.2d 484, 487 [noting that "the activities that support the jurisdictional claim must coincide with those that form the basis of the plaintiff's substantive claim"]; *Saylor v. Dyniewski* (7th Cir. 1988) 836 F.2d 341, 343 [holding "the case law plainly establishes that claims can only 'arise from' transactions if some connection exists between the nature of the claim and the nature of the transaction," but specifically limiting this part of the holding to interpretation of Illinois's long-arm statute]; *Pearrow, v. National Life & Accident Ins. Co.* (8th Cir. 1983) 703 F.2d 1067, 1068-1069 [interpreting only Arkansas's long-arm statute, the defendant's out-of-state negligence did not "arise out of" the defendant's in-state solicitation].) Only the first two cases cited actually support Seabest's claim, the others being interpretations of state long-arm statutes. As our review demonstrates, these authorities do not demonstrate that Seabest's test represents any "majority view" among the federal circuits.

Neither is Seabest's reliance upon *Hanson v. Denkla, supra*, 357 U.S. 235, as an "illustration" of the substantive relevance test particularly enlightening. In *Hanson*, legatees sought to establish personal jurisdiction over a Delaware trustee in a Florida court. The trust had been created in Delaware, and the beneficiary thereafter moved to Florida and there exercised her powers of appointment. The argument in support of Florida's exercise of jurisdiction was that the trustee had established sufficient "affiliation" with Florida to justify jurisdiction. The high court rejected this argument, finding insufficient minimum contacts between the Delaware trustee and the state of Florida. It explained that the trustee had no office in Florida and neither transacted nor solicited business there, and that the trust assets never had been held or administered in Florida. (P. 251.) In

addition, the court explained that "[t]he cause of action in this case is not one that arises out of an act done or transaction consummated in the forum State." (*Ibid.*) Seabest seizes on this statement as an example of its "substantive relevance" test. Its reliance is misplaced. In making this statement, the court was concerned not with establishing a general rule of relatedness for the purpose of specific jurisdiction, but with distinguishing the case at bar from *McGee v. International Life Ins. Co., supra*, 355 U.S. 220. In the latter case, the court held that a single forum contact in the form of an insurance contract could be the basis for jurisdiction, in light of the forum state's interest in providing effective redress when insurers that have solicited business in the state fail to pay claims. (*McGee v. International Life Ins. Co., supra*, 355 U.S. at p. 223; see also *Burger King, supra*, 471 U.S. at p. 475, fn. 18.) In *Hanson*, by contrast, the court stated that the contract that was the subject of the litigation had no connection with the forum state and therefore *could not count as a forum "contact"* on the part of the trustee. (*Hanson v. Denkla, supra*, 357 U.S. at p. 252.)

Consequently, the court reasoned, "this suit cannot be said to be one to enforce an obligation that arose from a privilege the defendant [trustee] exercised in Florida." (*Hanson v. Denkla, supra*, 357 U.S. at p. 252.) This language does not suggest that specific jurisdiction is legitimate only when a forum contact is substantively related to the plaintiff's cause of action — that is, when conduct constituting a forum contact normally would be pleaded under state substantive law applicable to the plaintiff's cause of action. Although the court in *Hanson* certainly found that when no relationship exists between the subject of the litigation and the forum, and there are no other contacts between the defendant and the forum, the exercise of jurisdiction is inappropriate, the court was not presented with the different question of how connected a cause of

action must be to forum contacts in order to establish specific jurisdiction.[11]

Seabest also urges the following policy rationales in support of the substantive relevance standard. It contends the test would prevent the assertion of jurisdiction based upon attenuated contacts that have no direct relationship to a lawsuit. We are not persuaded. Existing law regarding specific jurisdiction, with its emphasis upon "purposeful availment," already prohibits the exercise of jurisdiction on the basis of attenuated contacts. The assertion that the standard should ensure a direct relationship between the contacts and the lawsuit is simply another way of stating the standard promoted by Seabest, but does not advance a supporting argument.

Seabest also argues that the policy of long-arm statutes (and, presumably, the due process clause) is to permit states to regulate activities that take place within their borders, and that its proposed rule comports with this asserted policy. According to Seabest the interest of the state in regulating activity within its borders is implicated only when the plaintiff seeks to impose liability for some act that the defendant actually committed in the forum state. This rationale is stated more fully in the works of Professor Brilmayer, cited above.

We reject this argument, however, because in our view it fails to acknowledge another interest of the state that is

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[11] Seabest's reliance upon *Farris v. Capt. J. B. Fronapfel Co.* (1980) 182 Cal.App.3d 982, in support of the substantive relevance test also is unpersuasive. In that case, the Court of Appeal found no contacts between the defendant (a Florida ship inspector) and California, and no relationship between the plaintiff's fraud claim and this state. The court did not suggest that, even if the defendant purposefully had availed himself of benefits in California, jurisdiction over him would be improper unless the lawsuit alleged that defendant's in-forum contacts were substantively related to the claim.

recognized as an incident of state sovereignty. Specifically, not only does the state have the power as sovereign to regulate conduct through the application of its substantive law, but the state additionally has an interest in providing a judicial forum for its residents — so long as the goal of fairness to defendants also is observed. As the high court stated in *Burger King, supra*, 471 U.S. 462, explaining why a state legitimately may exercise specific jurisdiction: "A State generally has a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors." (*Id.* at p. 473, citing *McGee v. International Life Insur. Co., supra*, 355 U.S. at pp. 222-223; see also *id.* at pp. 223-224; and *Keeton v. Hustler Magazine, Inc., supra*, 465 U.S. at p. 776; see also Rush v. Savchuck (1980) 444 U.S. 320, 329, 323 [acknowledging state's interest in providing forum to resident, but holding such interest insufficient to justify jurisdiction when cause of action arose outside forum and the defendant's single forum contact would not render foreseeable the possibility of jurisdiction in that forum]; *Dunne v. State of Florida* (1992) 6 Cal.App.4th 1340, 1346.) This interest cannot be satisfied consistently with fairness to the defendant when the defendant has no minimum contacts with the state — but when the defendant does have such contacts with the state, it can be satisfied.

In short, the theoretical basis proffered for the substantive relevance standard is unpersuasive. The high court never has indicated that the state's sovereign power to regulate conduct within its borders is the sole justification for a state's exercise of specific jurisdiction. Rather, it has treated the question whether the state may assert power to regulate conduct in a particular case through its substantive law as distinct from the question whether minimum contacts have been established for the purpose of the state court's assertion of jurisdiction. (See *Keeton v. Hustler Magazine, Inc., supra*, 465 U.S. at p. 778; see also *Kulko v. Superior Court,*

supra, 436 U.S. at p. 98; *Shaffer v. Heitner, supra*, 433 U.S. at p. 215; Twitchell, *The Myth of General Jurisdiction* (1988) 101 Harv. L.Rev. 610, 654-655; Korn, *The Choice of Law Revolution: A Critique* (1983) 88 Colum. L.Rev. 772, 786-787.) Indeed, the high court has made it clear that a state's jurisdiction to provide a forum is *not limited* to claims that involve conduct that took place within the state's borders. (*Burger King, supra*, 471 U.S. at p. 476; see 1 Casad, Jurisdiction in Civil Actions, *supra*, § 2.05, p. 2-99.) Rather, as noted, the state has a legitimate interest as sovereign in providing its residents with protection from injuries caused by nonresidents and with a forum in which to seek redress. This assertion of sovereignty with respect to nonresident defendants is fair when those defendants have availed themselves of certain benefits within the state and the claim is related to those contacts. The relatedness requirement is imposed in order to ensure fairness to defendants who have relatively attenuated contacts with the state, and not to reflect that the state's sovereign power is limited to adjudicating claims that arise within its borders.

Especially inappropriate is Seabest's suggestion that the state may not provide a forum in a case in which the nonresident has taken advantage of the state's market or laws and in the process injured a forum resident. As already pointed out in connection with the proximate cause test applied by the Court of Appeal, a restrictive test of relatedness is inconsistent with the fairness rationale that informs the specific jurisdiction analysis. That is, a person who purposefully takes advantage of the benefits of doing business in the forum state fairly can be required to answer lawsuits that relate to his or her activities there (*Burger King, supra*, 471 U.S. at p. 472); such an exercise of jurisdiction does not offend " 'traditional notions of fair play and substantial justice.' " (*International Shoe, supra*, 326 U.S. at p. 316.) As the high court has admonished: "[T]o the extent that a [defendant] exercises the privilege of

conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the [defendant] to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue." (*Id.* at p. 319.) The substantive relevance test would make jurisdiction turn upon pleading requirements under state substantive law, a focus that falls far from the real issue of evaluating jurisdiction in terms of fundamental fairness.

We also note that the substantive relevance test proposed by Seabest would have produced a different outcome in *Cornelison, supra*, 16 Cal.3d 143. In that case, the defendant's forum activities (making deliveries in California) presumably would not have been relevant in the wrongful death action based upon a claim that the defendant negligently drove his truck, thereby causing the accident in Nevada. Nonetheless, we were of the view that California could, consistently with "fair play and substantial justice," exercise specific jurisdiction over the defendant.

Seabest argues finally that the substantive relevance test provides a bright line rule and affords the simplest guideline for courts to follow. Academic commentators have noted the same attraction in this test. (See Note, *supra*, 50 Wash. & Lee L.Rev. at p. 1290; Rose, *Related Contacts, supra*, 82 Cal.L.Rev. at p. 1579; Twitchell, *The Myth of General Jurisdiction, supra*, 101 Harv. L.Rev. at p. 653.) Simple rules, however, are not always correct rules. A rule that essentially limits the jurisdiction of a forum to acts occurring within its boundaries may be easy to apply, but it is overly mechanical and is inconsistent with the thrust of recent high court opinions. It is inconsistent not only with express language in *Burger King, supra*, 471 U.S. 462, acknowledging the power of the state to exercise jurisdiction over out-

of-state conduct that injures a forum resident, but also is inconsistent with the direction followed by the court ever since it explained in *International Shoe, supra*, 326 U.S. 310, that "the criteria by which we mark the boundary line between those activities which justify the subjection of a [defendant] to suit and those which do not, cannot be simply mechanical or quantitative. . . . Whether due process is satisfied must depend . . . upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure." (*Id.* at p. 319.) In *World Wide Volkswagen, supra*, 444 U.S. 286, and *Asahi Metal Industry Co. v. Superior Court, supra*, 480 U.S. 102, for example, involving negligently designed products placed in the stream of commerce at the forum, the proposed test easily would have produced a holding that, because any negligence or design defect occurred outside the forum and no forum contact would have been pleaded in a domestic complaint raising the same claim, the forum could not exercise jurisdiction over the defendant manufacturers or distributors. Yet the United States Supreme Court instead undertook the traditional three-part analysis of jurisdiction outlined in its earlier cases. There is no indication the substantive relevance test would find favor in the high court.

In the context of ongoing franchise relationships, we have rejected the proximate cause test as too narrow, and the "but for" test as too broad and amorphous. Finally, we conclude that the substantive relevance test is inappropriate, based as it is upon an overly restrictive view of the interest of the state in providing a judicial forum and redress to its residents. In sum, one must question the utility of importing a causation test from tort law to measure a matter that is fundamentally one of relationship and fairness rather than causation, keeping in mind that mechanical tests are inconsistent with a court's basic task of determining whether the exercise of personal jurisdiction would comport with " 'fair

play and substantial justice.' " (*Burger King, supra*, 471 U.S. at p. 486.) As the high court explained: "This approach does, of course, preclude clear-cut jurisdictional rules. But any inquiry into 'fair play and substantial justice' necessarily requires determinations 'in which few answers will be written in black and white. The greys are dominant and even among them the shades are innumerable.' " (*Id.* at p. 486, fn. 29.)

D

Having determined that defendants did establish minimum contacts with California, we finally must consider whether the assertion of specific jurisdiction is fair. (*Burger King, supra*, 471 U.S. at p. 476.) In this connection, a court "must consider the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief. It must also weigh in its determination 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.' " (*Asahi Metal Industry Co. v. Superior Court, supra*, 480 U.S. at p. 113; see also *Burger King, supra*, 471 U. S. at p. 477.) Because we conclude defendants had the requisite minimum contacts with California, the burden is now on them to "present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." (*Burger King, supra*, 471 U.S. at p. 477.)

The Court of Appeal did not reach this part of the analysis, having concluded the claim lacked a sufficient relationship to the cross-defendants' California contacts. Because we are as equipped as the Court of Appeal to analyze this point, we decide it here rather than remanding the matter to the intermediate court.

WRMI asks us to consider that it had "virtually no contact" with California, that all the conduct that is the

basis for Vons's claim occurred in Washington, that witnesses from Washington (mostly young persons formerly employed in its restaurants) would be forced to travel to California, and that WRMI is a small corporation that would be unduly burdened by being forced to defend itself in an extensive multi-party lawsuit far from home. WRMI also points out that it would be at a disadvantage at this point in time, because the litigation has continued during review of the order on its motion to quash.

Seabest asks that we consider the allegedly tenuous and minimal nature of its contacts with California and the irrelevance of those contacts to Vons's claims against Seabest, the availability of the Washington forum to adjudicate not only Vons's cross-complaint, but the entire action, and the circumstance that a majority of the evidence relevant to Vons's claim will be in Washington. Seabest also urges that because it has no corporate presence in California, an undue burden would be imposed were it required to litigate in this state. It claims that Washington law should be applied, because Vons's claim turns on assertions that Seabest's cooking practices violated Washington law. Seabest also notes that some cases consider the extent to which the plaintiff's choice of forum appears to be the result of forum shopping, and suggests that Vons may have chosen the California forum in order to secure punitive damages that would be unavailable under Washington law. Seabest would discount California's interest in providing a forum for its residents, because Vons is a sophisticated litigant that can secure relief in any forum. Finally, Seabest argues California has no interest in regulating the conduct involved in the litigation, because all of the relevant conduct took place outside its borders.

We have concluded that Seabest and WRMI had significant contacts with California through their ongoing business relationship with Foodmaker, and that the litigation bears a

substantial connection to that forum relationship. We are not persuaded it would be unfair to subject Seabest and WRMI to the jurisdiction of the California courts.

As the high court has explained, "When minimum contacts have been established, often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the defendant." (*Asahi Metal Industry Co. v. Superior Court, supra*, 480 U.S. at p. 114.) Vons is a corporation, with headquarters in California, that not only alleged injury arising from Seabest's and WRMI's conduct, but that has been sued in the California forum in complex multi-party litigation as to which Seabest and WRMI may have a degree of concurrent liability. California has an obvious and direct interest in protecting Vons from injury and providing it with a forum in which its claims for relief may be adjudicated, enabling it to obtain the relief to which it is entitled. Moreover, considerations of judicial efficiency overwhelmingly favor litigation of all claims in a single forum. Because California already has invested judicial resources in this litigation apart from its substantive interest in the claims, the additional interest of efficiency favors this state's exercise of jurisdiction. Finally, although the burdens on defendants are not inconsiderable, they are not such "as to make litigation 'so gravely difficult and inconvenient' " that Seabest and WRMI would be at a "severe disadvantage" (*Burger King, supra*, 471 U.S. at p. 478) in comparison to Vons, not the least because Foodmaker's agreement to provide a defense and indemnify Seabest and WRMI substantially mitigates those burdens.

With respect to Seabest's arguments regarding the substantive law to be applied, the United States Supreme Court has explained that such concerns "usually may be accommodated through means short of finding jurisdiction unconstitutional. For example, the potential clash of the forum's law with the 'fundamental substantive social policies' of

another State may be accommodated through application of the forum's choice-of-law rules." (*Burger King, supra*, 471 U.S. at p. 477, fn. omitted.) And, as in *Burger King*, where the defendant claimed Michigan's franchise laws governed many aspects of the franchise relationship, the acknowledged interest of Washington in applying its own law does not render California's interest null, or — more importantly — unconstitutional (*Id.* at p. 483.) As for the claimed disparity in economic power and sophistication between Seabest and WRMI on the one hand, and Vons on the other, to the extent such a disparity is relevant, whatever disparity exists is mitigated, again, by Foodmaker's agreement to provide a defense to the extent one is not provided by Seabest's and WRMI's insurers.

For the reasons set forth above, we conclude Seabest and WRMI have failed to demonstrate that exercise of jurisdiction by the California courts in this matter would be fundamentally unfair.

III

The judgment of the Court of Appeal is reversed and the matter is remanded for further proceedings not inconsistent with this opinion.

GEORGE, C.J.

WE CONCUR:

MOSK, J.
KENNARD, J.
BAXTER, J.
WERDEGAR, J.
CHIN, J.
BROWN, J.

Second Appellate District, Division Five,
No. B0-94228
S049039

IN THE SUPREME COURT
OF CALIFORNIA

THE VONS COMPANIES INCORPORATED,
Appellant

v.

SEABEST FOODS INCORPORATED Et Al.,
Respondents

Appellant's petition for rehearing DENIED.

SUPREME COURT
FILED
FEB 5 1997
Robert Wandruff, Clerk
Deputy

/s/ GEORGE
Chief Justice

(2)

Supreme Court, U.S.
FILED
JUN 26 1997
CLERK

No. 96-1762

In the Supreme Court of the United States

OCTOBER TERM, 1996

WASHINGTON RESTAURANT MANAGEMENT, INC.,
Petitioner,
v.
THE VONS COMPANIES, INC.,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of California

BRIEF IN OPPOSITION

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29 pp

RULE 29.1 LISTING

Respondent The Vons Companies, Inc. is a wholly-owned subsidiary of Safeway Southern California, Inc., which in turn is a wholly-owned subsidiary of Safeway Inc. The shares of Safeway Inc. are publicly traded. Vons has no subsidiaries that are not wholly-owned.

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No. 96-1762

In the Supreme Court of the United States

OCTOBER TERM, 1996

WASHINGTON RESTAURANT MANAGEMENT, INC.,
Petitioner,
v.
THE VONS COMPANIES, INC.,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of California

BRIEF IN OPPOSITION

Respondent The Vons Companies, Inc. respectfully prays that the Court deny the petition for a writ of certiorari filed by Washington Restaurant Management, Inc.

STATEMENT OF THE CASE

This case arises from an outbreak of illnesses among customers of Jack In The Box restaurants in several western states, including Washington and California. The customers became ill after eating undercooked hamburger patties containing *Escherichia coli* O157:H7, a pathogenic bacteria that occurs naturally in raw beef but is killed with proper cooking.

Foodmaker, Inc. is a California-based corporation that manages the Jack In The Box restaurant chain through its corporate headquarters in San Diego, California. Petitioner

Washington Restaurant Management, Inc. ("WRMI") owned and operated Jack In The Box outlets in the State of Washington pursuant to a detailed franchise agreement with Foodmaker. WRMI was among the Jack In The Box franchisees whose restaurants were implicated in the outbreak. Respondent The Vons Companies, Inc. became involved in the Jack In The Box litigation because it processed the hamburger patties from raw meat delivered by upstream suppliers.

The present action began in mid-1993, when eighty-five Jack In The Box franchisees from California and elsewhere (not including petitioner WRMI or any other franchisee that was implicated in the outbreak) sued Foodmaker, Vons, and several suppliers of raw beef in the California Superior Court, seeking damages for loss of business caused by the adverse publicity surrounding the outbreak. Foodmaker cross-complained against Vons, based upon Vons' role in processing the hamburger patties.

Vons then filed a cross-complaint against Foodmaker and the Jack In The Box franchisees that had been identified with specific reported illnesses. Among the cross-defendants were petitioner WRMI and Seabest Foods, Inc. (Seabest was a party to the proceedings below but did not file a petition for certiorari.) Vons alleged that the standard cooking procedures required by Foodmaker's franchise agreement were inadequate to ensure that hamburger patties would be properly cooked and thus safe for human consumption. Vons also alleged that the equipment and training procedures mandated by Foodmaker's franchise agreement were below industry standard, with the result that petitioner and other Jack In The Box franchisees did not properly cook the hamburger products and customers consequently were placed at risk of illness. Vons claimed damages for indemnity, as well as lost profits resulting from negative publicity caused by the outbreak.

The Superior Court granted WRMI's motion to quash service of Vons' cross-complaint for lack of personal jurisdiction, and the California Court of Appeal affirmed. *See Vons Companies, Inc. v. Seabest Foods, Inc.*, 37 Cal. App. 4th 1090 (1995). The Supreme Court of California then granted Vons' petition for review.

The California Supreme Court reversed the judgment of the Court of Appeal, holding that the Due Process Clause of the Fourteenth Amendment did not prohibit California from exercising personal jurisdiction over WRMI. The court rested its decision primarily upon this Court's decision in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), which the court concluded "largely governs the outcome here." Pet. App. 14a. The court found that the Jack In The Box franchisees here, like the franchisee in *Burger King*, had "reached out beyond" their state of residence and "purposefully availed themselves of benefits in the forum by reaching out to forum residents to create an ongoing franchise relationship." Pet. App. 14a-15a.

The California Supreme Court's analysis turned upon a detailed comparison between the franchise agreement at issue here and the contract terms considered by this Court in *Burger King*. As in *Burger King*, petitioner affiliated itself with a business with headquarters in the forum state, knowing "that [its] operations would be supervised by that headquarters." Pet. App. 15a. The court cited this Court's reasoning that "'[i]n light of [the franchisee's] voluntary acceptance of the long-term and exacting regulation of his business from Burger King's Miami headquarters, the "quality and nature" of his relationship to the company in Florida can in no sense be viewed as "random," "fortui-

tous," or "attenuated." ' " *Id.* at 15a-16a (quoting *Burger King*, 471 U.S. at 480).[1]

The California Supreme Court found that WRMI and Seabest, "like the defendants in *Burger King*," had "purposefully availed themselves of benefits in the forum by reaching out to forum residents to create an ongoing franchise relationship." Pet. App. 14a. "As in Burger King, the franchisees here reached out to the California Foodmaker business, and clearly sought out and benefited from the California business's multi-state name-recognition and organization," including "the standardization provided for under the franchise agreement." *Id.* at 16a, 27a-28a. The court noted that Seabest and WRMI "purposefully undertook ongoing contractual obligations to the California business," and made "substantial and continuing purchases from Foodmaker in California." *Id.* at 16a. Among other things, WRMI and Seabest were required by the franchise agreement to use only equipment approved by Foodmaker, to adopt the uniform food preparation standards designed by Foodmaker, to purchase its hamburger meat through Foodmaker, and to allow Foodmaker to inspect its restaurants on a regular basis to ensure compliance. *Id.* at 4a-6a, 25a. As noted below, Vons' claims arose directly from these provisions of the franchise agreement.

The California Supreme Court concluded, based on *Burger King*, that if Foodmaker had sued Seabest and WRMI in California in a breach of contract action based on the franchise agreements, California clearly would have had

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[1] In its petition, WRMI suggests that the California Supreme Court's finding of jurisdiction was based upon sporadic contacts with California. Pet. 4. That is not the case, as is evident from the court's extensive discussion of the franchise relationship between Foodmaker and its franchisees, pursuant to which the franchisees, including WRMI, submitted to detailed and extensive regulation from the State of California of their franchise operation.

jurisdiction over the action (Pet. App. 16a) — a proposition that WRMI does not dispute here and did not dispute below. Likewise, the court noted that if Foodmaker were to seek indemnity from the franchisees based upon a violation of the franchise agreement, jurisdiction would be readily established. *Id.* at 16a-17a. Thus, the only remaining question was whether it made a difference that a "third party" such as Vons, rather than Foodmaker, was the plaintiff bringing the suit against the franchisees. *Id.* at 17a.

The California Supreme Court held that it did not. Pet. App. 17a. Because it was Seabest and WRMI themselves — and not Vons or any other third party — that purposefully established extensive contacts with the forum state, it could not be said that requiring them to answer Vons' claim in that state would be "to allow a third party unilaterally to draw them into a connection with the state." *Id.* Likewise, because Seabest and WRMI "had an ongoing commercial relationship" with California, the exercise of jurisdiction over them would not "depend on 'random, fortuitous or attenuated' contacts." *Id.*

The court further explained that, under precedent of this Court and the lower courts, "the defendant's forum activities need not be directed at the *plaintiff* in order to give rise to specific jurisdiction." *Id.* at 26a (emphasis in original). Rather, this Court's decisions all have emphasized the relationship among "the defendant, *the forum*, and the litigation — not between the plaintiff and the defendant." *Id.* at 27a (emphasis in original). In each of this Court's cases in this area, the court noted, "the relevant contacts are said to be with the *forum,* because it is the defendant's choice to take advantage of opportunities that exist in the forum that subjects it to jurisdiction." *Id.* (emphasis in original; citing *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 112 (1987) (plurality opinion); *Burger King*, 471 U.S. at 475, 479; *Helicopteros Nacionales de Colombia*

v. Hall, 466 U.S. 408, 414 (1984); and *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)). The court relied upon *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), where this Court held that a publisher could be held accountable in New Hampshire for defamatory publications there, even though the plaintiff had no relationship with New Hampshire. The court also cited decisions of the Seventh Circuit and the Federal Circuit holding that it is the defendant's relationship with the *forum*, and not with the particular *plaintiff* bringing the action, that drives the personal jurisdiction analysis. Pet. App. 26a-27a (citing *Akro Corp. v. Luker*, 45 F.3d 1541 (Fed. Cir. 1995) and *In re Oil Spill by Amoco Cadiz*, 699 F.2d 909 (7th Cir. 1983)).

The court also rejected petitioner's argument that there was not a sufficient connection between Vons' claims and petitioner's contacts with California. The court looked to its earlier precedent holding that there must be a "substantial connection" between the action and the defendant's forum-based contacts, and also looked to this Court's stated requirement that the action be " 'related to or "arise[ ] out of" a defendant's contacts with the forum.' " Pet. App. 20a (citing *Helicopteros*, 466 U.S. at 414 and *Burger King*, 471 U.S. at 472). The court also noted that its formulation of the test was consistent with the decisions of the Sixth Circuit in *Third National Bank v. WEDGE Group, Inc.*, 882 F.2d 1087, 1091 (6th Cir. 1989); the Seventh Circuit in *Amoco Cadiz*, 699 F.2d at 917; the Eighth Circuit in *Northrup King Co. v. Compania Productora Semillas*, 51 F.3d 1383, 1388 (8th Cir. 1995); the Eleventh Circuit in *Francosteel Corp. v. M/V Charm*, 19 F.3d 624, 627 (11th Cir. 1994) and *Vermeulen v. Renault, U.S.A. Inc.*, 985 F.2d 1534, 1546 (11th Cir. 1992); and the Federal Circuit in *Akro Corp. v. Luker*, 45 F.3d at 1547. The court concluded that, under the standard established by these cases, "Vons has demonstrated a substantial nexus between WRMI's and

Seabest's business contacts in California and Vons' tort claims against WRMI and Seabest." Pet. App. at 24a.

The California Supreme Court explained that the terms of the franchise contract between WRMI and Foodmaker were at the heart of Vons' claims against WRMI, thereby creating a "substantial connection" between WRMI's contacts with the forum and Vons' claims. Pet. App. 18a-20a. The court noted that petitioner's contacts with the forum "bore a substantial relationship to the claimed injury to Vons's business and reputation" because Foodmaker's franchise agreement required petitioner to purchase the hamburger patties from Foodmaker and to prepare them "according to the standards provided under the franchise agreement." *Id.* at 28a.[2] "Vons' cross-complaint alleged that the franchisees failed to cook the meat properly because of deficiencies in the cooking and training procedures and equipment requirements provided for by Foodmaker on a systemwide basis." *Id.* The court concluded that Vons' claims were substantially related to petitioner's contacts with California, including its voluntary submission to an ongoing and extensive contractual relationship with Foodmaker:

> The franchise relationship, with its uniform standards for cooking food, training employees, and buying equipment, itself was a source of injury to Vons. . . . Accordingly, both the negligence claims and the claim for indemnification arose out of the contractual relationship between Foodmaker, WRMI and Seabest, a relationship that had a substantial connection to California. Pet. App. 24a-25a.

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[2]Petitioner erroneously states that it purchased the hamburger meat from "distributors and suppliers in the State of Washington." Pet. 4. In fact, as the California Supreme Court correctly noted, petitioner purchased the hamburger patties from Foodmaker.

The court also found significant the terms of Foodmaker's franchise agreement stating that in any dispute regarding the franchise agreement, the parties would be bound *both* by California law *and* by provisions establishing California courts as the venue for any such dispute. Pet. App. 16a. Given these provisions, the court observed, "it was not only predictable that [the franchisees] might face litigation in California — it was *settled* that any litigation on the contract would occur in this forum." *Id.*

In determining the standard that should apply to assess the relationship between the defendant's contacts with the forum and the plaintiff's cause of action, the California Supreme Court rejected two prior decisions of the California appellate court, which had applied a "proximate cause" test that formed the basis for the California Court of Appeal's decision below. Pet. App. at 31a-33a. The California Supreme Court held that the "proximate cause" analysis used in these cases was inconsistent with this Court's formulation in *Burger King* and *Helicopteros,* which "states in the disjunctive that jurisdiction is proper when litigation results from alleged injuries that 'arise out of or relate to' forum activities." *Id.* at 33a (citing *Burger King,* 471 U.S. at 472; *Helicopteros,* 466 U.S. at 414, n.9; and *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)). The court also reasoned that a "proximate cause" test would inappropriately prohibit jurisdiction in most contract actions arising out of ongoing interstate relations — because in most such cases, as in *Burger King* itself, it cannot be said that the contractual relationship with the forum *caused* a party to fail to honor the terms of the contract. Pet. App. 34a. Accordingly, the court rejected the suggestion of the lower California courts that a "proximate cause" test should govern the personal jurisdiction analysis. *Id.* at 34a-36a. The court did not point to any federal circuit that had applied a "proximate cause" test.

The California Supreme Court did note that two federal circuits have articulated a broad "but for" test for determining whether an exercise of specific jurisdiction is sufficiently related to a defendant's forum-based contacts. Specifically, the court cited the Ninth Circuit's decision in *Shute v. Carnival Cruise Lines,* 897 F.2d 377 (9th Cir. 1990), *reversed on other grounds,* 499 U.S. 585 (1991), as well as a footnote in the Fifth Circuit's opinion in *Prejean v. Sonatrach, Inc.,* 652 F.2d 1260, 1270 n.21 (5th Cir. 1981) — both of which set forth a broad "but for" test for determining whether a claim is sufficiently related to a defendant's contacts with the forum. Pet. App. 38a-39a. The California Supreme Court rejected the "but for" test advanced in these cases, concluding that the importation of tort-based causation standards that focus on physical factors — such as the "but for" test — are not useful in analyzing "the social activities that are part of the causal chain in typical personal jurisdiction disputes." Pet. App. 40a. The court reasoned that "contacts in personal jurisdiction cases are generally social acts, like advertising directed at forum residents." *Id.* at 41a. The court concluded that analyzing these issues under a *relational* test, rather than a *causal* test, is more consistent both with the concerns underlying personal jurisdiction questions, and with this Court's precedents speaking "of a *relationship* between the cause of action and the contacts in the forum," and using "relatively broad terms to describe the necessary relationship." *Id.* (citing *International Shoe*, 326 U.S. at 319; *Burger King*, 471 U.S. at 472; and *Helicopteros*, 466 U.S. at 414, n.9).

Finally, the court rejected Seabest's invitation to adopt a "substantive relevance" test, which would look to whether acts forming each essential element of the plaintiff's substantive cause of action occurred in the forum. Pet. App. 43a-52a. The court found that this test — which has been advanced by one legal commentator in the area but not

adopted by any court[3] — focused unduly on the particularized elements of each cause of action under state law, and was inconsistent with this Court's cases establishing a relational test and making clear that jurisdiction need not be based solely upon a defendant's activities within the physical boundaries of the forum state. *Id.* at 49a-50a.

REASONS FOR DENYING THE WRIT

Nothing in the California Supreme Court's carefully reasoned decision warrants review by this Court. As that court recognized, this Court's decision in *Burger King* largely controls the personal jurisdiction analysis in this case. To the limited extent that *Burger King* is not directly controlling — *i.e.*, to the extent that the claims against WRMI are asserted by Vons, rather than by the franchisor itself — the California Supreme Court correctly held that the proper focus is on the relationship between the defendant and the *forum*, not on the relationship between the defendant and the *plaintiff*. Because there is no split on this issue and the point was correctly decided, it is not worthy of this Court's review.

The only other issue identified by petitioner is the proper standard to be applied in determining whether an action "arises out of or relates to" a defendant's forum-based contacts so as to warrant application of the *International Shoe* "minimum contacts" analysis — rather than the general jurisdiction standard that must be met when an action does not relate to the defendant's forum contacts. *See generally Helicopteros*, 466 U.S. at 414-15. For three rea-

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[3] The court soundly rejected Seabest's argument that this test "now represents the majority view in the federal circuits." Pet. App. 44a.

sons, this issue does not warrant granting the petition in this case.

First, petitioner dramatically overstates the degree to which confusion continues to exist in the lower courts on this issue. Despite petitioner's contention that there is a split between courts applying a "proximate cause" test and those applying a different standard, there is *no* federal circuit that continues to apply the "proximate cause" standard. Of the three circuits to which petitioner attributes this test, one of those courts — the First Circuit — has explicitly abandoned any strict "proximate cause" test, and the two other cases that petitioner cites — decisions of the Second and Eighth Circuits — have been construed as merely interpreting the state long-arm statutes rather than establishing a constitutional standard. More recent decisions of the Second and Eighth Circuits apply a relational standard much like that applied by the California Supreme Court here.

Second, the issue is not squarely presented in this case because, under any of the standards discussed by the California Supreme Court, the result would be the same. As the court explained, the extensive and detailed provisions of the franchise agreement between Foodmaker and petitioner are more than sufficient to establish the requisite contacts with the State of California. It is these contacts that form the basis for Vons' claims, which are based upon the allegation that the procedures, equipment, and training mandated by Foodmaker's standard franchise agreement were insufficient to ensure proper cooking of the hamburger patties involved in the outbreak. In short, Vons' claims flow directly from the franchise agreement itself — and thus would satisfy both this Court's "arises out of or relates to" test as generally stated (*see Burger King*, 471 U.S. at 472), and any of the variations on that test that have been applied by the lower courts.

Third, petitioner's more general request for "clarification" of this Court's standards for personal jurisdiction is nothing more than an invitation to engage in a fact-bound inquiry into whether petitioner's extensive contacts with California through its franchise agreements with Foodmaker are sufficiently related to Vons' claims to warrant the exercise of personal jurisdiction — as is evident from fact-specific nature of the "Question Presented for Review" in the petition. This Court has frequently and clearly stated the relatedness requirement in its previous cases. *See, e.g., International Shoe*, 326 U.S. at 319-20 (minimum contacts analysis is appropriate where the claims "arose out of or are connected with" the defendant's contacts with the forum state); *Helicopteros*, 466 U.S. at 414 and n.9. Most recently, in *Burger King*, the Court again discussed the "relatedness" requirement, restating the standard as whether the plaintiff's claims "arise from or relate to" the defendant's forum contacts. As long as the defendant's forum activities satisfy this broad standard and constitute "minimum contacts" with the forum, the Court is assured that the fairness and predictability concerns of the Due Process Clause have been met. Moreover, because this Court's test is inevitably fact-specific, it is unlikely that any one case will definitively settle the law in this area. *See Burger King*, 471 U.S. at 485-86 (noting that "the facts of each case must be weighed in determining whether personal jurisdiction would comport with fair play and substantial justice").

In sum, whatever confusion may have existed among the lower courts as to when an action "arises out of or relates to" a defendant's forum-based contacts largely has been alleviated by recent cases, including the decision below, rejecting tort-based analogies and focusing instead on the relationship between the defendant and the forum. Given the growing consensus on this issue, this Court should await further developments in the lower courts. At the very least, the Court should await a case in which resolution of the issue

will determine the outcome, such as cases in which a fortuitous contact with the forum is a "but for" cause of an injury in a distant state but might not meet more stringent relational standards for specific jurisdiction. *See, e.g., Shute*, 897 F.2d 377 (jurisdiction upheld where plaintiff's purchase of travel tickets in the state of Washington were held to be the "but for" cause of a slip-and-fall injury in international waters on a cruise ship that departed from Florida).

A. The Decision Below Rests Upon A Straightforward Application Of This Court's Decision In *Burger King Corp. v. Rudzewicz* And Does Not Merit This Court's Review

As the California Supreme Court recognized, the personal jurisdiction issue in this case was largely determined by this Court's analysis in *Burger King*. In *Burger King*, this Court found that the Michigan franchisee's extensive contacts with the State of Florida through his closely regulated contractual relationship were more than sufficient to comport with applicable due process standards — even though the franchisee had never physically set foot in Florida. The Court reasoned that "where the defendant . . . has created 'continuing obligations' between himself and residents of the forum, he manifestly has availed himself of the privilege of conducting business there . . . [B]ecause his activities are shielded by 'the benefits and protections' of the forum's laws, it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well." *Id.* at 475-76 (citations omitted).

This Court concluded that the defendant's franchise agreement with Burger King constituted "a *substantial* connection" with the State of Florida. *Id.*, at 479 (emphasis in original). "Eschewing the option of operating an independent local enterprise, [the defendant] deliberately 'reach[ed] out beyond' Michigan and negotiated with a Florida corporation for the purchase of a long-term

franchise and the manifold benefits that would derive from affiliation with a nationwide organization." *Id.* at 479-80. "[H]e entered into a carefully structured 20-year relationship that envisioned continuing and wide-reaching contacts with Burger King in Florida." *Id.* at 480. "In light of [the defendant's] voluntary acceptance of the long-term and exacting regulation of his business from Burger King's Miami headquarters, the 'quality and nature' of his relationship to the company in Florida can in no sense be viewed as 'random,' 'fortuitous,' or 'attenuated.' " *Id.*

This case is virtually indistinguishable from *Burger King*. As in *Burger King*, the California Supreme Court held that petitioner had subjected itself to jurisdiction in the California courts when it contracted for the significant benefits associated with an affiliation with a national fast food chain and, in return, submitted to extensive regulation of its activities through the franchise agreement. Pet. App. 16a-18a, 39a-30a. The agreement that petitioner entered into with Foodmaker was nearly identical to those in *Burger King*, including the strong emphasis on uniformity of all aspects of the operation of restaurants within the Jack In The Box "System." *Id.* at 4a, 16a-17a, 27a-28a. Foodmaker franchisees, including petitioner, were required to submit to exacting regulation of every aspect of their operations, including "uniform standards for cooking food, training employees, and buying equipment." *Id.* at 25a-26a. *Compare also* JA II 629[4] (franchise agreement requiring franchisee to submit to uniform standards for "restaurant designs and color scheme, signage, interior decor, equipment systems, product and supplies, specifications, menu formats and service methods and procedures") *with Burger King*, 471 U.S. at 464, n.1 (mandating uniform "restaurant format and operating system, including a recognized design, decor,

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[4]References to "JA" are to the Joint Appendix, Volumes I and II, in the record before the California Court of Appeal.

color scheme and style of building, uniform standards, specifications and procedures of operation, quality and uniformity of products and services offered"). As in *Burger King*, the parties acknowledged that these standards were "necessary and essential to the image and success of each Jack In The Box restaurant and the [Jack In The Box] system [as a whole]." JA II 629 (franchise agreement).

Like the franchisee in *Burger King*, petitioner " 'reached out beyond' " its state of residence and negotiated with a California corporation "for the purchase of a long-term franchise and the manifold benefits that would derive from affiliation" with a multistate organization. *Burger King*, 471 U.S. at 479-80. It entered into a carefully structured long-term relationship that "envisioned continuing and wide-reaching contacts" with Foodmaker in California. *Id.* at 480. Finally, it voluntarily accepted "the long-term and exacting regulation" of its business from Foodmaker's San Diego headquarters. *Id.* As the California Supreme Court noted, WRMI's contacts with California "can in no sense be viewed as 'random,' 'fortuitous,' or 'attenuated.' " Pet. App. at 15a-16a (quoting *Burger King*, 471 U.S. at 480).

Indeed, petitioner had more extensive ties with California than the individual franchisee in *Burger King*, who had "no physical ties to Florida" other than his partner's attendance at a brief training course. *Id.* at 479. Petitioner had significant physical contacts with California, including attendance at training sessions at Foodmaker facilities in California, trips by its principals to California in connection with the franchise relationship, and the negotiation and partial execution of the franchise agreements in California. Pet. App. 5a-6a. Because the *Burger King* defendant's very limited contacts were enough to constitute "purposeful availment" of the benefits and protections of the forum, it follows that WRMI's more extensive contacts meet that standard.

This Court in *Burger King* also emphasized the choice of law provision in Burger King's franchise agreement, which was a significant indication that the franchisee " 'purposefully availed himself of the benefits and protections of Florida's laws' by entering into contracts expressly providing that those laws would govern franchise disputes." *Burger King*, 471 U.S. at 482. Once again, this case is even stronger because petitioner not only availed itself of California's *laws*, but also invoked the protection and jurisdiction of its *courts* in any action — including an action brought by petitioner itself — to enforce the agreements. Pet. App. 4a-5a. As the California Supreme Court noted, this provision clearly indicates that petitioner purposefully availed itself of the benefits of California law. *Id.* at 16a.

The only difference between this case and *Burger King* is that here the plaintiff is not a party to the franchise agreement that gives rise to "minimum contacts" with the forum. As to this issue, the California Supreme Court correctly held that it is the relationship between the defendant and the *forum*, and not the relationship between the defendant and the *plaintiff*, that controls the personal jurisdiction issue. *See* Pet. App. 26a (citing *Asahi*, 480 U.S. at 112 (plurality opinion); *Burger King*, 471 U.S. at 475, 479; *Helicopteros*, 466 U.S. at 414; *Shaffer*, 433 U.S. at 204 and *Keeton*, 465 U.S. at 775. As the court also noted, the federal courts to address this issue — the Seventh Circuit and the Federal Circuit — have reached the same conclusion, holding that it is the defendant's relationship with the *forum*, and not with the particular *plaintiff* bringing the action, that drives the personal jurisdiction analysis. Pet. App. 26a-27a (citing *Akro Corp.*, 45 F.3d at 1547 and *Amoco Cadiz*, 699 F.2d at 917). Because there is no conflict on this issue and the point was correctly decided below, it is not worthy of this Court's review.

B. Petitioner Overstates The Claimed Conflict Among The Lower Courts As To the Standard For Determining Whether A Claim "Arises Out Of Or Relates To" A Defendant's Contacts With The Forum

The petition focuses entirely on a claimed conflict among the federal courts as to the appropriate standard for determining whether a cause of action "arises out of or relates to" the defendant's forum-based contacts. Since *International Shoe*, this Court has held that the Due Process Clause is not offended by a state's exercise of jurisdiction over an out-of-state defendant where the defendant has availed itself of the benefits of the forum state and the obligations that the State seeks to enforce "arise out of or are connected with the activities within the state." 326 U.S. at 319. More recently, this Court has reiterated that the "minimum contacts" analysis of *International Shoe* applies where the plaintiffs' claims "arise out of or relate to" the defendants' contacts with the forum. *Burger King*, 471 U.S. at 472-73; *see also id.* at 474 (where defendant has engaged in activities with respect to the forum, specific jurisdiction is proper "for disputes relating to such activity"); *Helicopteros*, 466 U.S. at 414 (relevant test for application of *International Shoe* is whether "a controversy is related to or 'arises out of' " the defendant's forum-related activities). It is this latter standard, petitioner claims, that has given rise to confusion in the lower courts.

1. Since The Decision In *Shute*, The Lower Courts Have Moved Away From Tort-Based Tests For Personal Jurisdiction, Alleviating the Circuit Split Created By Earlier Decisions

WRMI asserts that a serious conflict exists among the circuit courts over the degree of relatedness required between the defendant's contacts with the forum and the plaintiff's claims in order for the *International Shoe* "minimum contacts" test to apply. Petitioner asserts that the

circuits are split into "two general camps" — one advocating a stringent "proximate cause" standard for relatedness and the other a "broad 'but for' " standard. Pet. 11.

Petitioner's statement might have had some merit in 1990, when this Court granted certiorari in *Carnival Cruise Lines, Inc. v. Shute,* 498 U.S. 807-08 (1990). That case arose from a decision of the Ninth Circuit, in which the Ninth Circuit had noted that the federal courts had reached different conclusions on the issue, some applying a "but for" test and others using a "proximate cause" standard. The Ninth Circuit specifically noted that the choice between these two tests determined the outcome in that case because the plaintiffs' purchase of travel tickets in the forum — a fact that the Ninth Circuit found to be a "but for" cause of their injury on a cruise ship in international waters — would not have been sufficient under a "proximate cause" test. The Ninth Circuit selected the "but for" standard and upheld jurisdiction.

This Court granted certiorari on this question in *Shute, see* 498 U.S. 807-08 (1990), but ultimately decided the case on another ground without reaching the personal jurisdiction issue. *Carnival Cruise Lines, Inc. v. Shute,* 499 U.S. 585 (1991). The Court noted that "it is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case." *Id.* at 589-90 (citation omitted).

Although the tort-based "proximate cause" and "but for" standards may have been a perceived source of circuit conflict in 1990, when this Court granted certiorari in *Shute,* the lower courts more recently have moved away from analyzing the "relatedness" requirement in these terms. The general trend among the federal circuit courts — like the California Supreme Court's decision below — is to look directly to this Court's "arise out of or relates to" test rather than apply tort-based causation standards such as "proxi-

mate cause" or "but for." Indeed, the "proximate cause" standard — one side of the split that Petitioner asks this Court to resolve — has been all but abandoned by the First Circuit, the only federal circuit in which it continued to be the law. *See Nowak v. Tak How Investments, Ltd.*, 94 F.3d 708, 716 (1st Cir. 1996). Petitioner concedes that *Nowak* represents a retreat from the stringent "proximate cause" standard. Pet. 11.

In *Nowak*, the plaintiff's decedent drowned in the pool of the defendant's Holiday Inn in Hong Kong. Plaintiff's employer was a Massachusetts corporation that had contracted for a minimum number of nights at the Holiday Inn in return for a discounted rate. The defendant kept in regular contact with the Massachusetts corporation as to their rates, and mailed promotional material to Massachusetts.

The First Circuit found that the necessary degree of relatedness between contacts and cause of action had been met, reasoning that "[w]hile the nexus between Tak How's solicitation of [the Massachusetts corporations] business and Mrs. Nowak's death does not constitute a proximate cause relationship, it does represent a meaningful link between Tak How's contact and the harm suffered." *Nowak*, 94 F.2d at 716. The court concluded that this "meaningful link" satisfied due process limits on the court's exercise of personal jurisdiction over the defendants.

The First Circuit in *Nowak* rejected the argument that a line of First Circuit cases, beginning with *Marino v. Hyatt Corp.*, 793 F.2d 427 (1st Cir. 1986) and including *Pizarro v. Hoteles Concorde Int'l, C.A.*, 907 F.2d 1256 (1st Cir. 1990) (cited by petitioner here), established "proximate cause" as the applicable federal standard. The court recognized, as it had previously, that these cases rested upon an interpretation of Massachusetts's long-arm statute that since had been rejected by the Massachusetts Supreme Judicial Court. *Nowak*, 94 F.3d at 713 (citations omitted). The court

concluded that a strict "proximate cause" test was *not* appropriate in the constitutional context because it was "unnecessarily restrictive." *Id.* at 715.

Petitioner attempts to resurrect the proximate cause test by erroneously claiming that the Second and Eighth Circuits adhere to this standard. However, the two cases cited for this proposition — *Pearrow v. National Life & Acc. Ins. Co.*, 703 F.2d 1067 (8th Cir. 1983), and *Gelfand v. Tanner Motor Tours, Ltd.*, 339 F.2d 317 (2nd Cir. 1964) — do not support the point. Both cases were decided before this Court's decisions in *Burger King* and *Helicopteros,* and both have been construed as mere interpretations of the relevant state long-arm statutes, which require a more stringent relationship between the forum contacts and the cause of action. *See, e.g., Beacon Enterprises, Inc. v. Menzies*, 715 F.2d 757, 765 (1983) (construing *Gelfand* as an application of New York's longarm statute); Pet. App. 46a (noting that *Pearrow* has been construed as an interpretation of the state long-arm statute, rather than a constitutional ruling).

Petitioner fails to cite other, more recent decisions of both the Second and the Eighth Circuits assessing the relationship between the defendant's contacts with the forum and the cause of action under a relational standard very similar to the standard applied by the California Supreme Court here. In *Agency Rent A Car System, Inc. v. Grand Rent A Car Corp*, 98 F.3d 25 (2nd Cir. 1996), for example, the Second Circuit relied upon this Court's analysis in *Burger King* to conclude that the defendants were subject to personal jurisdiction in New York:

> As in *Burger King*, licensees have 'deliberately reach[ed] out' beyond their home states for the purpose of 'a long-term franchise and the manifold benefits that would derive from affiliation with a nationwide organization.' As such, they purposefully availed themselves of the forum and

> shouldhave reasonably foreseen being haled into court here.

98 F.3d at 32 (citing *Burger King*, at 479-80). Significantly, *Gelfand* is no longer cited by any court as authority on the degree of "relatedness" required by the due process clause.

The Eighth Circuit also has changed its standard since its decision in *Pearrow*. In *Bell Paper Box, Inc. v. U.S. Kids, Inc.*, 22 F.3d 816 (8th Cir. 1984), the Eighth Circuit explicitly acknowledged adjusting its "relatedness" standard to comport with recent decisions of this Court. It then applied the "arising out of or related to" standard to find that it had specific jurisdiction over the defendant. *Id.* at 819; *see also Wessel, Arnold & Henderson v. National Med. Waste, Inc.*, 65 F.3d 1427 (8th Cir. 1995). As these cases indicate, the Eighth Circuit has moved toward a relational standard rather than a tort-based causation test to determine the scope of personal jurisdiction.

Most of the lower federal courts have acknowledged that their standards, though differently stated, are similar in application. The Sixth Circuit has stated that although a cause of action need not "formally 'arise from' defendant's contacts with the forum," there must be a "substantial connection" with the defendant's forum activities. *Third National Bank v. WEDGE Group*, 882 F.2d 1087, 1091 (6th Cir. 1989). It has equated its "substantial connection" requirement with the "lies in the wake of" standard employed by the Seventh Circuit in *Amoco Cadiz*, 699 F.2d at 915-16. The Sixth Circuit also has noted that its position is consistent with the Fourth and Eleventh Circuit standards, as well as with this Court's precedents. *Third Nat'l Bank*, 882 F.2d at 1091 ("The law of this circuit . . . is consistent with the Supreme Court's language in *International Shoe* . . . [and] with [the standard applied] by at least two other circuits. *See City of Virginia Beach v. Roanoke River Basin Ass'n*, 776 F.2d 484, 487 (4th Cir. 1985); *Southwire*

Co v. Trans-World Metals & Co., 735 F.2d 440, 442 (11th Cir. 1984).")

The California Supreme Court similarly noted here that its "substantial connection" standard is consistent with the standards adopted by most federal circuits. Pet. App. 21a-23a. Moreover, the standard applied by the court below and the federal courts discussed above comports with this Court's precedents setting forth the values underlying the Due Process Clause. The "substantial connection" between defendant's forum activities and the cause of action, coupled with the requirement that those activities constitute "minimum contacts" with the forum, ensures that the defendant will be forewarned that his purposeful availment of the forum may subject him to suit there.

The only circuit court that clearly remains separate from the others is the Ninth Circuit, which continues to apply a tort-based "but for" test rather than the relational standard suggested by this Court's decisions and applied by other federal courts. *See Ballard v. Savage*, 65 F.3d 1495, 1500 (9th Cir. 1995) (reaffirming the "but for" test of *Shute*); *Doe v. American Nat'l Red Cross*, 1197 U.S. App. LEXIS 9650 (May 2, 1997) at *9 (same).[5] Given the near-unanimity with which the other federal courts are reaching consensus, there is a substantial possibility that the Ninth Circuit will follow suit. If it does not, then a case from the Ninth Circuit directly posing the question would be a more appropriate vehicle for resolving the issue.

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[5] Even the Ninth Circuit has qualified its "but for" standard somewhat by noting that the "reasonableness" element of the due process analysis may allow a defendant to defeat personal jurisdiction even where the defendant's activities were purposefully directed at the forum and were the "but for" cause of the plaintiff's injuries, but where exercising jurisdiction under the circumstances would be unreasonable. *Doe*, 1997 U.S. App. LEXIS 9650 at *10.

2. The Legal Question That Petitioner Poses Is Not At Issue In This Case

Even if further guidance by this Court were needed to resolve variations among the "relatedness" standards applied by the lower courts, this case is a poor vehicle for doing so because it does not squarely present the issue. As the California Supreme Court explained here, petitioner's long-term franchise agreement with a California corporation is at the heart of Vons' counterclaim and was a direct and immediate cause — even in a strict tort sense — of Vons' injuries. Petitioner's franchise agreements with Foodmaker, a California corporation, required it to prepare and cook hamburger meat in an unsafe manner, causing injury to Jack In The Box customers. Petitioner's extensive contractual ties with California dictated the very actions that form the substantive basis for Vons' claims. These actions — the inadequate preparation and cooking of hamburger meat — are both the "proximate" and the "but for" cause of the injuries caused by petitioner. As a result, California's assertion of personal jurisdiction in this case simply does not rest upon this Court's selection of a "relatedness" standard.

Even if this Court concludes that guidance is needed at some point to clarify the necessary relationship between the defendant's contacts with the forum and the cause of action, it should await a case that squarely presents the issue. Specifically, the Court should await one of the many cases where a sporadic contact with the forum state is a "but for" cause of an injury in a foreign state, but otherwise bears little relation to the plaintiffs' action or the injury itself.

In *Shute*, for example, the defendant's forum contacts consisted merely of advertising in the forum and distributing brochures to travel agents within the forum. One such travel agent booked passage on defendant's cruise ships for Washington residents. Although the defendant's contacts were extensive enough to constitute the "but for" cause of plain-

tiff's injuries aboard defendant's cruise lines, they were not the proximate cause of those injuries. As the Ninth Circuit itself recognized, its application of a "but for" standard, rather than a "proximate cause" standard, was determinative of that court's finding of jurisdiction.

This case does not frame the relatedness requirement in such sharp relief. Accordingly, rather than granting certiorari in a case that will not require the Court to reach the only question that the petitioner has identified as certworthy, this Court should await a case in which the relatedness standard determines the forum's assertion of personal jurisdiction.

CONCLUSION

In sum, the conflict that petitioner claims exists among the lower federal courts has largely resolved itself. To the extent that further clarification is necessary, this Court should await a case that presents a more appropriate vehicle for resolving the issue. The petition for a writ of certiorari should be denied.

Dated: June 26, 1997

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

WASHINGTON RESTAURANT MANAGEMENT, INC.,
Petitioner,
vs.
THE VONS COMPANIES, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

REPLY TO BRIEF IN OPPOSITION

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A. Burger King is not dispositive on the facts of this case

Respondent devotes considerable space and effort to convincing this Court of a proposition which is not at issue: that

the relationship between petitioner WRMI, the franchisee, and Foodmaker, the franchiser, is similar to the franchisee/ franchiser relationship which existed in Burger King v. Rudzewicz 471 U.S. 462 (1985) and that this relationship is sufficient to establish the "purposeful availment" prong of the minimum contacts analysis with respect to WRMI's contractual relationship with Foodmaker. (R.O.,13-16)[1] However, the key factors which distinguish this case from Burger King are that this is not an action between WRMI and Foodmaker nor is it an action on the contract with Foodmaker.

It is undisputed in this action that WRMI's contacts with California were insufficient to subject it to general jurisdiction in that State. (Pet. 9a) It is further beyond dispute that purposeful availment alone is not sufficient to establish specific jurisdiction. As this Court recognized in Helicopteros Nacionales de Colombia, S.A. v. Hall 466 U.S. 408 at 414, n. 8, (1984), specific jurisdiction is jurisdiction over the defendant in a suit arising out of or related to the defendant's contacts with the forum.

Thus, even assuming, arguendo, that WRMI's contacts with California were sufficient to establish that WRMI "purposefully availed itself" of the benefits and protections of California with respect to its contractual relationship with Foodmaker, this does not establish that the current claim by Vons, who is not a party to the WRMI/Foodmaker contract, who admittedly has no contractual or business relationship with WRMI, whose claim does not arise out of an alleged breach of the Foodmaker contract and whose claim does arise out of allegedly tortious conduct which took place entirely outside of California,"arises out of or is related to" WRMI's limited forum contacts. It is this relatedness prong, not the purposeful

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[1] "R.O." refers to Respondent's Opposition.

availment prong, which is at the heart of this dispute.

Respondent attempts to circumvent the separate relatedness requirement by materially mischaracterizing the decision of the California Supreme Court in this action as holding that "it is the relationship between the defendant and the forum, and not the relationship between the defendant and the plaintiff, that controls the personal jurisdiction issue." [emph. in original] (R.O. 16) In fact, this is not at all what the California Supreme Court said. What it did say was that "[t]he United States Supreme Court has stated more than once that the nexus required to establish specific jurisdiction is between the defendant, *the forum*, and the litigation." [citing Helicopteros, supra, 466 U.S. at p. 411, Shaffer v. Heitner 433 U.S. 186, 204] (1977), (Pet. 27a.)[italics in original; underlining added.] Thus, contrary to Respondent's veiled suggestion that purposeful availment (the relationship between the defendant and the forum) alone is sufficient to establish jurisdiction, in fact, the California Supreme Court and this Court agree that there is an additional requirement that there must also be a nexus between the defendant's forum contacts and the litigation (ie, the claim).

In other words, it is not enough that defendant has purposefully availed himself, in some context, to the forum. In order for specific jurisdiction to be established, there must also be a sufficient nexus between defendant's relationship with the forum and the claim itself. The claim must "arise out of or relate to" defendant's forum contacts. It is the nature of this nexus that is at issue here, and the application of this standard that has created the splits between and among the lower courts which can and should be resolved by the granting of this Petition.

B. Petitioner has not overstated the extent of the conflict among the lower courts regarding the relatedness standard

While not denying that there is a conflict between the lower courts regarding application of the relatedness standard in minimum contacts analysis, Vons argues that review of this issue is not necessary because petitioner "overstates" the extent of that conflict, claiming that since this Court's decision in Carnival Cruise Lines, Inc. v. Shute 498 U.S. 807-808 (1990), the lower courts have somehow moved closer to resolution of this issue. (R.O, 17-18) With all due respect, the contention simply does not stand up to scrutiny.

First, as Vons acknowledges, this Court did not even reach the personal jurisdiction issue in Shute. (R.O. 18) On this basis alone it is difficult to understand how this Court's decision in Shute, which expressly declines to consider the jurisdiction issue, could have any impact, and much less be binding authority, on the lower courts' analysis of the relatedness standard.

Next Vons contends that in Nowak v. Tak How Investments, Ltd. 94 F.3d 708, 716 (1st Cir., 1996), the proximate cause standard "has been all but abandoned by the First Circuit." (R.O. 19) This contention is patently wrong. In its August 1996 Nowak decision, the First Circuit engaged in a detailed discussion of the various relatedness standards applied by various courts, acknowledging that most courts "have gravitated toward one of two familiar tort concepts--'but for' or 'proximate cause.' After carefully analyzing the variations on these standards adopted by the federal circuits, the First Circuit concluded by reaffirming its adherence to the proximate cause standard, subject to very narrow exceptions. Directly contrary to Vons' assertion, (R.O., 19) the Nowak court did not "reject the argument that a line of First Circuit cases . . .

established 'proximate cause' as the applicable federal standard" (R.O. 19) nor did it conclude that these cases rested on a state long-arm statute and that a proximate cause analysis was not appropriate in the constitutional context. Quite to the contrary.

Specifically the Nowak court acknowledged the decision of the Supreme Judicial Court of Massachusetts in Tatro v. Manor Care, Inc. 416 Mass. 763, 625 N.E.2d 549, 551 (Mass. 1994) which rejected the First Circuit's proximate cause test insofar as it deals with the construction of the Massachusetts long arm statute, opting instead to utilize the broader "but for" standard. Notwithstanding the demise of the proximate cause analysis in connection with the Massachusetts statute, however, the Nowak court concluded that with respect to constitutional principles, the proximate cause analysis is the most appropriate standard. The court explained:

> We think the attraction of proximate cause is two-fold. First, proximate or legal cause clearly distinguishes between foreseeable and unforeseeable risks of harm. [citations omitted.] . . . adherence to a proximate cause standard is likely to enable defendants better to anticipate which conduct might subject them to a state's jurisdiction than a more tenuous link in that chain of causation. . . . [W]e think the proximate cause standard better comports with the relatedness inquiry because it so easily correlates to foreseeability, a significant component of the jurisdictional inquiry. (Nowak, supra, 94 F.3d at 715)

The First Circuit went on not only to emphasize the importance of proximate causation, but also to acknowledge that in certain limited circumstances, a "slight loosening" of this standard might apply. (Id., 716) The court stressed that its

acknowledgment that in certain limited circumstances some small amount of flexibility might be appropriate is to be recognized as a "narrow exception to the proximate cause test" (Id., p. 716) which represents only "a small overlay of 'but for' on 'proximate cause.'" (Id., p. 716) Thus, far from "abandoning" the proximate cause test, the Nowak court expressly reaffirmed its general adherence to that standard, albeit while recognizing a very limited exception.

Vons cites Agency Rent A Car System, Inc. v. Grand Rent A Car Corp. 98 F.3d 25 (2nd Cir., 1996) and Bell Paper Box, Inc. v. U.S. Kids, Inc. 22 F.3d 816 (8th Cir., 1984) for the proposition that the Second and Eighth Circuits no longer adhere to the proximate cause standard. Neither case supports this proposition. Agency, like Burger King, involved alleged breaches of contracts and the action was between the parties to the contracts. Although defendants resided out of state, it was clear that their businesses arose out of an ongoing contractual relationship with an in-state company and that the defendants communicated with the in-state headquarters and accessed in-state services on an almost daily basis. Clearly the causes of action for breach arose directly out of their extensive relationships with the forum state. Therefore, in Agency, as in Burger King, the court engaged in almost no analysis of the "relatedness" prong other than to acknowledge that it had been easily met.

Similarly, in Bell Paper the dispute involved an alleged breach of contract between the parties to a contract where the subject matter of the dispute occurred entirely within the forum state. Again, because the close relationship between the claim and defendant's contacts with the forum was obvious, the court engaged in virtually no discussion of the relatedness prong of the jurisdictional analysis. Thus, contrary to Vons' assertion, Bell Paper does not signal a "move toward a relational standard," it merely acknowledges, without analysis, the fact

that specific jurisdiction is premised on the relationship between the cause of action and defendant's contacts with the forum. This proposition is not in dispute. The same analysis applies to Wessels, Arnold & Henderson v. National Medical Waste, Inc. 65 F.3d 1427 (8th Cir., 1995), another breach of contract action.

Vons acknowledges that the Ninth Circuit continues to apply and advocate the 'but-for' test, but asserts that the Ninth Circuit has "qualified" this standard by noting in Doe v. American National Red Cross 112 F.3d 1048 (9th Cir., 1997) that a defendant may defeat jurisdiction which is "unreasonable" even where the purposeful availment and relatedness prongs are met. (R.O. 22) In fact, Doe did not qualify or modify the Ninth Circuit's minimum contacts analysis. Rather, it reiterated that Circuit's adherence to the but-for relatedness standard and repeated the standard tri-partite test for establishing specific jurisdiction: (1) purposeful availment of the privilege of conducting activities in the forum; (2) the claim must arise out of or result from defendant's forum-related activities; and (3) the exercise of jurisdiction must be reasonable. (Id., p. 1051) These are the same factors which the courts have traditionally applied and their repetition in Doe represents no change from the Ninth Circuit's previous position. (See, for example, Omeluk v. Langsten Slip & Batbyggeri A/S 52 F.3d 267, 270 (9th Cir., 1995); see also Fireman's Fund Insurance Company v. National Bank of Cooperatives 103 F.3d 888 (9th Cir., 1996).

Thus, it is plainly apparent that the state and federal appeals courts continue to be divided over the proper application of the relatedness standard and Vons' assertions notwithstanding, there has been no significant settling of this question in the lower courts since the Shute decision. In this regard, it is noteworthy that Vons has utterly failed to address the many recent law review articles and scholarly commentaries, a number of which are cited in the Petition, identifying the

continued confusion and lack of cohesion in the lower courts and expressly bemoaning the lack of Supreme Court guidance on this important due process issue.

C. The legal question that petitioner poses is at issue in this case

Vons' suggestion that this case does not squarely present the relatedness issue is without merit. The California Supreme Court devoted thirty-six pages of its opinion to a discussion of the relatedness standard and the various ways it has been applied by the appellate courts. (Pet. 17a-53a.) In concluding that a "substantial nexus" test is the proper standard for assessing relatedness, the Supreme Court expressly rejected no less than three other standards which have been applied by various courts (Pet. 52a-53a) In reaching this conclusion, the California Supreme Court also was compelled to specifically disapprove two California cases upon which the Court of Appeal had relied in concluding that Vons' claims were not sufficiently related to defendant's forum contacts so as to establish specific jurisdiction. (Pet. 31a-32a)[2] Indeed, the opening paragraph of the California Supreme Court's decision summarizes its holding as follows:

> We conclude that the franchisees had sufficient contacts with California through their relationship with their California franchiser, and that the tort claims alleged against the franchisees . . . were sufficiently related to the franchisees' contact in California to justify this

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[2] Circus Circus Hotels, Inc. v. Superior Court (1981) 120 Cal.App.3d 546 (Circus Circus) and Sklar v. Princess Properties International, Ltd. (1987) 194 Cal.App.3d 1202 (Sklar)

state's exercise of jurisdiction over the franchisees. (Pet. 1a)

Obviously this case has everything to do with the relatedness standard and review of this case provides the perfect vehicle for this Court to resolve the long-standing confusion in this fundamental area of the law.

Respectfully submitted,

Dated: July 3, 1997

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